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Review of Labor and Employment Decisions from the United States Supreme Court's 2008–2009 Term

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I. Introduction

In its most recently completed Term, the United States Supreme Court decided eight labor and employment law cases of some consequence. The decided cases covered a broad array of labor and employment subjects, including: the Employee Retirement Income Security Act (ERISA), Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), public sector labor law, and private sector labor law. Practitioners who specialize in a particular area might be tempted to focus on only the cases in their area. Academics might be tempted to try to devise some economic or logical theory that ties together these diverse decisions. However, after even modest reflection, it is apparent that the best way to understand the underlying dynamics of the Supreme Court's 2008–2009 Term with respect to labor and employment law cases is to consider the voting patterns of the individual justices and the Court's overall vote in each case.

The labor and employment law decisions from the Court's 2008–2009 Term might be divided into two categories: "broad consensus" cases, which are decided by at least a 6-3 vote of the justices, and "close cases," which are decided by a bare 5-4 vote. Even though a 6-3 vote indicates significant disagreement among the justices, we might call it a "broad consensus" in that, as we will see, a six-vote majority includes at least one justice from both the liberal and conservative wings of the Court. It is very revealing to first divide the Court's decisions in this fashion and then arrange the decisions and the votes of the justices chronologically. Although the insight gained from this exercise will not surprise followers of the Court, even dedicated students of the Court will be impressed by its predictability in deciding the labor and employment law cases this last Term.

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TABLE OF CASES

Broad Consensus Cases

Case	Issue / Outcome	Vote / Opinion Authors
Locke *v.* *Karass*, 129 S. Ct. 798 (2009).	The First Amendment permits local unions to consider national litigation expenses as a chargeable cost in nonmember service fees, as long as the expenses are "appropriately related to collective bargaining" and "reciprocal in nature." Union wins.	Decided 9-0, January 21, 2009 Unanimous: Breyer Concurrence: Roberts (joined by Scalia)
Kennedy *v.* *Plan Administrator for DuPont Savings and Investment Plan*, 129 S. Ct. 865 (2009).	A plan administrator complies with ERISA by distributing benefits in accordance with the directives of plan documents, even when such benefits have been waived according to common law waiver doctrine. Employer wins.	Decided 9-0, January 26, 2009 Unanimous: Souter
Crawford *v.* *Metropolitan Government of Nashville and Davidson County, Tennessee*, 129 S. Ct. 846 (2009).	Title VII protects employees who are interviewed during their employers' internal investigations about allegations of sexual harassment. Employee wins.	Decided 9-0, January 26, 2009 Majority: Souter (joined by Roberts, Stevens, Scalia, Kennedy, Ginsburg, and Breyer) Concurrence: Alito (joined by Thomas)
Ysursa *v.* *Pocatello Education Ass'n*, 129 S. Ct. 1093 (2009).	Idaho's ban on payroll deductions for political activities, as it applied to local government employers, does not infringe unions' First Amendment rights, because the State's decision not to promote speech furthers its rational interest in separating the operation of government from partisan politics. Union loses.	Decided 6-3, February 24, 2009 Majority: Roberts (joined by Scalia, Kennedy, Thomas, and Alito; joined in part by Ginsburg) Concurrence: Ginsburg (in part and in the judgment) Concurrence/Dissent: Breyer Dissent: Stevens Dissent: Souter
AT&T Corp. *v.* *Hulteen*, 129 S. Ct. 1962 (2009).	An employer's bona fide seniority system does not violate Title VII, even where the system allows for differential treatment that has been subsequently deemed unlawful. Employer wins.	Decided 7-2, May 18, 2009 Majority: Souter (joined by Roberts, Stevens, Scalia, Kennedy, Thomas, and Alito) Concurrence: Stevens Dissent: Ginsburg (joined by Breyer)

Close Cases

Case	Issue/ Outcome	Vote
14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009).	A collective bargaining agreement that clearly and unmistakably requires employees to arbitrate individual claims under the ADEA is enforceable. Employer wins.	Decided 5-4, April 1, 2009 Majority: Thomas (joined by Roberts, Scalia, Kennedy, and Alito) Dissent: Stevens Dissent: Souter (joined by Stevens, Ginsburg, and Breyer)
Gross v. FBL Financial Services, Inc., 129 S. Ct. 2343 (2009).	Under the ADEA, the burden of proof never shifts from plaintiff to employer in a mixed-motive discrimination case. Furthermore, in order for a plaintiff to prove discrimination under the ADEA, it must show that age was a "but for" factor in the employer's decision to take adverse action. Employer wins.	Decided 5-4, June 18, 2009 Majority: Thomas (joined by Roberts, Scalia, Kennedy, and Alito) Dissent: Stevens (joined by Souter, Ginsburg, and Breyer) Dissent: Breyer (joined by Souter and Ginsburg)
Ricci v. DeStefano, 129 S. Ct. 2658 (2009).	Before employers can engage in intentional, race-conscious discrimination for purposes of avoiding or remedying a disparate impact, Title VII requires them to have a "strong basis in evidence" to believe that they will be subject to disparate-impact liability for failing to take such discriminatory action. Employee wins.	Decided 5-4, June 29, 2009 Majority: Kennedy (joined by Roberts, Scalia, Thomas, and Alito) Concurrence: Alito (joined by Scalia and Thomas) Dissent: Ginsburg (joined by Stevens, Souter, and Breyer)

Two observations are apparent after even a cursory review of this table of cases. First, with a modest exception for *AT&T Corp. v. Hulteen*, the least controversial cases were decided first. All three of the unanimous opinions were handed down in January, followed by *Ysursa v. Pocatello Education Ass'n* (a 6-3 decision) in February, *AT&T Corp. v. Hulteen* (a 7-2 decision) decided in May, and then the three 5-4 "close cases" decided in April and June. Indeed, perhaps the most controversial employment law decision, *Ricci v. DeStefano*, was handed down the very last day of the Court's Term. Second, in all of the close cases, the majority consisted of Justice Kennedy joining the more conservative wing of the Court, consisting of Chief Justice Roberts and Justices Thomas, Scalia, and Alito. This combination of justices not only composed the majority in all the close cases, it also was in the majority in all other labor and employment decisions the Court made this year. For the 2008–2009 Supreme Court Term, there were no decisions in labor and employment law that did not meet the approval of all of the Court's five most conservative judges.

Justice Kennedy's importance in forming Supreme Court majority opinions is not unique to labor and employment law. Since the retirement of Justice O'Connor, Justice Kennedy has often been the "man in the middle" between the Court's ideological wings: the liberal wing represented by Justices Stevens, Souter, Breyer, and Ginsburg, and the conservative wing composed of Justices Roberts, Thomas, Scalia, and Alito. Examining all of the seventy-five cases decided this Term, there were a total of twenty-three 5-4 decisions. Of these twenty-three cases, Justice Kennedy was the deciding vote in eighteen—or just over seventy-eight percent.[1] Indeed, looking at all of the decisions this Term, Justice Kennedy was in the majority ninety-two percent of the time—far more than any other justice.[2] Justice Kennedy's role as the important swing vote between the liberal and conservative wings of the Supreme Court almost since the inception of Chief Justice Roberts' tenure has led some academics to suggest that "the Roberts Court" should really be called "the Kennedy Court."[3]

A quick review of decisions shows that Justice Kennedy more often votes with the conservative wing of the Court. Looking at all cases in the 2008–2009 Term, there were sixteen 5-4 decisions, and in eleven of those, Justice Kennedy sided with the four most conservative justices.[4] This performance is consistent with Justice Kennedy's performance in previous years.[5] Justice Kennedy occasionally sides with the liberal wing, particularly on issues of preserving individual liberties against government intrusion or to preserve past precedents. More often than not, however, it seems that Justice Kennedy's views on law and the Constitution coincide with those of Justices Roberts, Thomas, Scalia, and Alito.

With respect to labor and employment law cases, although Justice Kennedy has occasionally sided with the liberal wing, he has more often sided with the conservative wing—and that was clearly the case this last Term. In the 2007–2008 Supreme Court Term, there was only one 5-4 labor and employment law decision: *Kentucky Retirement System v. EEOC*.[6] In that case, Justice Kennedy found himself in the minority with the curious combination of Justices Ginsburg, Scalia, and Alito. The year before that, however, Justice Kennedy sided with the conservative wing in the *Ledbetter*[7] decision, the Court's only 5-4 labor and employment law case of the 2006–2007 Term. Further, the year before that Justice Kennedy sided with the conservative wing in the *Garcetti*[8] decision in the Court's only 5-4 labor and employment law case of the 2005–2006 Term. In the most recent Term, Justice Kennedy's penchant for siding

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[1] Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 GREEN BAG 2D 413, 414 (2009).

[2] *Id.*

[3] *See, e.g.*, Erwin Chemerinsky, *When It Matters Most, It Is Still The Kennedy Court*, 11 GREEN BAG 2D 427 (2008); Charles Whitebread, *The Conservative Kennedy Court—What A Difference A Single Justice Can Make: The 2006–2007 Term of the United States Supreme Court*, 29 WHITTIER L. REV. 1 (2007); Erwin Chemerinsky, *The Kennedy Court*, 9 GREEN BAG 2D 335 (2006); David Cole, *The 'Kennedy Court'*, THE NATION, July 31, 2006, at 6.

[4] Chemerinsky, *supra* note 1, at 414.

[5] *See generally*, Whitebread, *supra* note 3.

[6] 128 S. Ct. 2361 (2008).

[7] Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (2007).

[8] Garcetti v. Ceballos, 547 U.S. 410 (2006).

with the conservative wing seems to have fully blossomed, as he sided with the conservative bloc in all three of the 5-4 labor and employment law cases for the Term, and indeed he sided with them in all of the Term's labor and employment law cases. It seems that on questions of conflicts between individuals and private employers, or the exercise of collective rights, Justice Kennedy's predilections fall in line with those of the conservative wing. Certainly anyone who is considering appealing a case to the Supreme Court should study very closely Justice Kennedy's past opinions to determine whether he or she has any chance of gaining his vote. A lawyer who represents employees should think doubly hard about this question.

The appointment of Justice Sotomayor to replace Justice Souter does not seem to change this situation. Basically her appointment just replaces one member of the liberal wing with another, not changing the Court's ideological division. Dean Erwin Chemerinsky has argued that Justice Sotomayor's different experiences and perspectives may have an impact on how other justices decide cases—perhaps even Justice Kennedy[9]— but this remains yet to be seen. Some research in personnel management suggests that the greatest value of diversity is achieved by people who connect or flow among various groups rather than strongly identify with just one group.[10] This suggests that a person who strongly identifies as a "latina" may be a poor consensus builder on the Court, at least in comparison with a similar person who is not so invested in his or her gender and ethnic identity. At a minimum, it would seem unwise for Justice Sotomayor to begin her relationship with Justice Kennedy and the other members of the Court from the perspective that, as a Latina, she has had "richer life experiences" and makes "better" decisions than a white male.[11]

If her decisions while on the United States District Court for the Southern District of New York or the United States Court of Appeals for the Second Circuit are an accurate indication, then Justice Sotomayor's views on labor and employment law might be described as those of a garden variety, moderate-liberal Democrat. In her most visible labor opinion, *Silverman v. Major League Baseball Player Relations Commission*, [12] then-District Judge Sotomayor held that issues related to the players' free agency were mandatory subjects of bargaining, and the employers' unilateral changes in these terms warranted the section 10(j) injunctive relief sought by the National Labor Relations Board.[13] The Second Circuit later affirmed this decision, and it helped end the 1995 baseball strike.[14] In her most visible employment law decision, *Ricci v. DeStefano*,[15] then-Circuit Judge Sotomayor joined a very brief *per curiam* opinion that affirmed a district court's summary judgment order in favor of the employer, concluding that the white firefighters who objected to the setting aside of the results of an employment test had no viable

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[9] Chemerinsky, *supra* note 1, at 428.

[10] SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES (2008).

[11] Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, at 92 (2002).

[12] 880 F. Supp. 246 (S.D.N.Y. 1995), *aff'd*, 67 F.3d 1054 (2d Cir. 1995).

[13] *Id.* at 261.

[14] *See* Richard Sandomir, *A Baseball Ruling, A Steppingstone To the Top Court*, N.Y. TIMES, May 26, 2009, at B11.

[15] 530 F.3d 87 (2d Cir. 2008).

Title VII claim.[16] The reversal of this decision by the Supreme Court was perhaps the Court's most visible case of the Term and is discussed at length below.

Beyond these highly visible cases, other opinions of Sotomayor's that were reviewed by the authors amount to a respectable resume of labor and employment law cases—but she is not known as having particular expertise in the subject. More often than not she has voted to uphold employee and union interests; however, she is not a sure vote for those interests and regularly sees the employer's side of the argument. Because of her lack of expertise in the subject and her modest inclination toward employee and union interests, it seems unlikely that Justice Sotomayor will take over Justice Souter's role of writing a disproportionate number of the consensus labor and employment law cases. That role will perhaps fall to Justice Stevens as the last remaining moderate Republican currently sitting on the Court.

We turn now to a detailed review of the Supreme Court's labor and employment law decisions for the 2008–2009 Term.

II. Broad Consensus Cases

Even among the decisions that found broad consensus among the Supreme Court Justices, there were important precedents decided this Term, including two important cases under antidiscrimination laws.

A. Title VII Cases

1. *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*[17]

A. CASE BACKGROUND

(i.) Issue and Context

The issue in *Crawford* was whether the opposition clause of Title VII of the Civil Rights Act of 1964 protects employees who speak out about discrimination when answering questions as part of an employer's internal investigation.[18] The opposition clause forbids an employer from retaliating "against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . . ."[19]

At the circuit court level, it is well established that participation in an employer's internal investigation, on its own, is not protected by the other antiretaliation prong of Title VII: the

[16] *Id.* at 87.
[17] 129 S. Ct. 846 (2009).
[18] *Id.* at 849.
[19] 42 U.S.C. § 2000e-3(a) (2006).

participation clause.[20] However, until *Crawford* the courts of appeals had not directly addressed whether such conduct is protected under the opposition clause. In holding that such conduct falls outside the scope of statutory protection, the Sixth Circuit in *Crawford* was out of sync with the other circuits.

While circuit courts have taken various approaches in defining the scope of protected employee "opposition," common themes among their decisions point to a relatively consistent body of law. Protected conduct clearly extends beyond the filing of a formal complaint.[21] The circuits are virtually unanimous in holding that "informal protests of discriminatory employment practices" qualify for opposition clause protection.[22] The Court of Appeals for the Second Circuit, in oft-cited language, listed several examples of such informal conduct: "making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of coworkers who have filed formal charges."[23] Other courts have followed the lead of the Second Circuit by extending protection to letters written to management,[24] internal complaints to supervisors,[25] and the "informal expressions of one's views, whether through established grievance procedures or alternative forms of protest."[26]

When confronted with borderline cases, several circuits engage in some form of judicial balancing to determine whether an employee's conduct is protected under the opposition clause. The Fourth Circuit's balancing test weighs "the purpose of the Act to protect persons engaging reasonably in activities opposing . . . discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel."[27] According to the Third Circuit, "there is no hard and fast rule" to apply, and the tough questions are best answered by analyzing the substance—rather than the form—of the employee's

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[20] *See*, *e.g.*, EEOC v. Total Sys. Servs., Inc., 221 F.3d 1171, 1174 (11th Cir. 2000) ("[U]nder the participation clause, an employer may not retaliate against an employee because the employee has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." (quotation omitted)).

[21] *See*, *e.g.*, Cruz v. Coach Stores, Inc., 202 F.3d 560, 566 (2d Cir. 2000); Laughlin v. Metro. Wash. Airports Auth., 149 F.3d 253, 259 (4th Cir. 1998).

[22] Moore v. City of Philadelphia, 461 F.3d 331, 343 (3d Cir. 2006). *See also*, *e.g.*, Valentin-Almeyda v. Municipality of Aguadilla, 447 F.3d 85 (1st Cir. 2006).

[23] Sumner v. United States Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990).

[24] *See* Abramson v. William Patterson Coll., 260 F.3d 265, 288 (employee's letters); O'Neal v. Ferguson Const. Co., 237 F.3d 1248, 1255 (10th Cir. 2001) (letters written by employee's attorney).

[25] *See Valentin-Almeyda*, 447 F.3d 85; Pipkins v. City of Temple Terrace, 267 F.3d 1197 (11th Cir. 2001).

[26] Dea v. Wash. Suburban Sanitary Comm'n, 11 F. App'x 352, 361 (4th Cir. 2001).

[27] Laughlin v. Metro. Wash. Airports Auth., 149 F.3d 253, 259 (4th Cir. 1998).

conduct.[28] The opposing activity at the heart of *Crawford* is one of those borderline cases, and the Supreme Court addressed it through its own form of definitional balancing.

(ii.). Facts of the Case

The unlawful employment practice at issue in *Crawford* was the creation of a hostile work environment by Gene Hughes, who allegedly engaged in abusive sexual conduct.[29] Hughes was the Employee Relations Director for the Metro School District. When a human resources officer "began looking into rumors of sexual harassment," Crawford—a Metro employee—was interviewed and asked "whether she had witnessed 'inappropriate behavior.'"[30] She answered by describing "several instances" of what the Court deemed "sexually harassing behavior."[31] As part of the investigation, two other employees reported sexually harassing behavior by Hughes. Metro gave Hughes an oral reprimand, but fired all three employees who complained about Hughes's conduct.[32]

In deciding Crawford's Title VII retaliation claim, the District Court for the Middle District of Tennessee found that Crawford's statements fell outside the scope of the opposition clause.[33] It reasoned that, "she had not 'instigated or initiated any complaint,' but had 'merely answered questions posed by investigators in an already-pending internal investigation, initiated by someone else.'"[34] It thus granted summary judgment for Metro. The Court of Appeals for the Sixth Circuit affirmed the decision by relying on a restrictive interpretation of the opposition clause, which required opposition to be "active," "consistent," and "overt."[35]

B. SUPREME COURT

(i.) Arguments Before the Court

The legal battle between the parties focused primarily on three issues: the statutory meaning of "oppose," the legislative intent behind Title VII, and the policy implications inherent in statutory interpretation. There was also a lengthy debate regarding the participation clause, but the Court passed on this issue as unnecessary to its holding.[36]

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[28] Curay-Cramer v. Ursaline Acad. of Wilmington, Del., Inc., 450 F.3d 130, 135 (3d Cir. 2006) ("When deciding whether a plaintiff has engaged in opposition conduct, we look to the message being conveyed rather than the means of conveyance.").

[29] Crawford v. Metro. Gov't of Nashville and Davidson County, Tenn., 129 S. Ct. 846, 849 (2009).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* at 850.

[34] *Id.* (citation omitted).

[35] Crawford v. Metro. Gov't of Nashville and Davidson County, Tenn., 211 F. App'x 373, 376 (6th Cir. 2006).

[36] *Id.* at 377.

Respondents Metro relied on dictionary definitions of "oppose," arguing that the word's plain meaning required the communication of "resistance" or "hostile or contrary action."[37] Thus, for an employee to be protected by the opposition clause, she must "take some affirmative steps to communicate opposition," rather than "merely being in a re-active mode."[38] Because Crawford did not initiate her complaint, Metro saw her actions as falling short of the "active" and "overt" conduct required by the statute.[39]

Petitioner Crawford viewed the Sixth Circuit's interpretation of "oppose" as contrary to the text and purposes of Title VII.[40] Crawford's argument focused on the social complexity involved in workplace harassment, including the vulnerable position of victims. Countering the necessity of "active" opposition, Crawford argued that "'[p]assive resistance is a time honored form of opposition.'"[41] When sexual harassment victims attempt to prevent abuse by "trying to stay, literally, out of reach," this form of opposition should not be unprotected "merely because it is relatively low key, quiet, or even entirely passive."[42] Countering the necessity of "overt" opposition, Crawford explained that some workers "may opt for a less confrontational form of opposition precisely because he or she is afraid of retaliation."[43] Thus, in order to avoid a "perverse interpretation" of the opposition clause that exposes prudent victims to even greater harm, protection should cover "the cautious as well as the brazen."[44] These arguments were bolstered by Crawford's reliance on the language of an EEOC Compliance Manual, which described any statement or action that "would reasonably [be] interpreted as opposition" as satisfying the requirements of the opposition clause.[45]

Furthermore, Crawford argued that the antiretaliatory purposes of Title VII would be undermined if the Sixth Circuit's holding were affirmed. To do so would arguably exclude from future harassment cases the critical evidence of employee-witnesses, "whose statements may be essential to determining the merits of the initial allegations."[46] Also, employees might interpret the result of the new exceptions as "no protection at all."[47] Because few employees are able to afford "the legal advice required to devise the sophisticated tactics needed to obtain protection," Crawford claimed that employers would be able to fire those who made their complaints "at the wrong time, to the wrong person, or in the wrong terms."[48] Thus, the policy behind the statute—eradicating workplace harassment—would necessarily be hampered by formal and technical

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[37] Brief for Respondents at 27, Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn., 129 S. Ct. 846 (2009) (No. 06-1595).

[38] *Id.* at 30.

[39] *Id.*

[40] Brief for Petitioners at 46, Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn., 129 S. Ct. 846 (2009) (No. 06-1595).

[41] *Id.* at 47.

[42] *Id.*

[43] *Id.* at 51.

[44] *Id.* at 50–51.

[45] 2 EEOC Compl. Man. (BNA) § 8-II(B)(2), at 8–5 (Mar. 2003).

[46] Brief for Petitioners, *Crawford*, *supra* note 40, at 12.

[47] *Id.* at 54.

[48] *Id.*

restrictions.

Metro responded by claiming that an extensive interpretation of "oppose" would "warp[] the meaning of the term and render[] the 'participation' clause superfluous."[49] Stretching the scope of protection against retaliation to circumstances like those in this case, Metro argued, would allow employees to "ambush" employers with bogus claims.[50] Metro also claimed that the Court's previous rulings in *Faragher v. Boca Raton*[51] and *Burlington Industries, Inc. v. Ellerth*[52]—which, according to Metro, both encouraged employers to be proactive in eradicating discrimination and compelled employees to use the reasonable means available to them—would be weakened by a broad reading of "oppose."[53]

Alternatively, according to Metro, judicial policy-making was the wrong approach to resolving "any perceived ambiguity" in the Act.[54] Claiming that *Chevron* deference to Equal Employment Opportunity Commission (EEOC)interpretations was inappropriate in this case, Metro argued that changes to the statute (or to the rule-making authority of the EEOC) was a role reserved to the legislative branch.[55]

(ii.) Decision and Holding

Holding for Petitioner Crawford, the Court rejected the Sixth Circuit's restrictive interpretation of "oppose" by turning to the word's plain meaning. The Court relied on dictionary definitions and "ordinary discourse" usage to find that, "'[o]ppose' goes beyond 'active, consistent' behavior . . . ."[56] It was also influenced by the EEOC's interpretation of Title VII's opposition clause. Quoting from the same EEOC Compliance Manual cited by Crawford, the Court held, "'[w]hen an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication' virtually always 'constitutes the employee's *opposition* to the activity.'"[57] While the Court admitted possible exceptions to this rule, it stated that "these will be eccentric cases."[58]

Applied to the facts of this case, this broader definition of "oppose" encompassed Crawford's statements in response to Metro's internal investigation. According to the Court, "[t]here is . . . no reason to doubt that a person can 'oppose' by responding to someone else's

[49] Brief for Respondents, *Crawford*, *supra* note 37, at 25.
[50] *Id.* at 32.
[51] 524 U.S. 775 (1998).
[52] 524 U.S. 742 (1998).
[53] Brief for Respondents, *Crawford*, *supra* note 37, at 27–30.
[54] *Id.* at 39.
[55] *Id.* at 36–40.
[56] Crawford v. Metro. Gov't of Nashville and Davidson County, Tenn., 129 S. Ct. 846, 851 (2009).
[57] *Id.* (citing 2 EEOC Compl. Man. §§ 8-IIB(1)–(2), at 8–5 (Mar. 2003)) (italics in original).
[58] *Id.*

question just as surely as by provoking the discussion."[59] To hold otherwise would lead to a "freakish rule," under which an employee would be protected by Title VII if she took the initiative to report unlawful discrimination, but not if she reported "the same discrimination in the same words" in response to her employer's question.[60]

The Court also addressed Respondents' argument that a broad reading of "oppose" would undermine the purposes of Title VII by removing employers' incentive to investigate possible discrimination. The Court felt this argument underestimated the "strong inducement" that still existed for employers to avoid liability by ending discrimination in their workplace.[61] Furthermore, it rejected the claim that *Faragher* and *Ellerth* established an affirmative duty to report for employees: "We have never suggested that employees have a legal obligation to report discrimination against others to their employer on their own initiative, let alone lose statutory protection by failing to speak."[62] Turning Metro's argument on its head, the Court countered that the Sixth Circuit's holding would undermine the purposes of Title VII because it would give "prudent employees . . . a good reason to keep quiet" about discrimination.[63]

The Court suggested in dicta that "opposition" could also refer to inaction or silence. Citing a case from the Court of Appeals for the Seventh Circuit,[64] the Court attempted to broaden the scope of the Act's protection beyond the circumstances in this case. For example, the Court "would call it 'opposition' if an employee took a stand against an employer's discriminatory practices not by 'instigating' action, but by standing pat, say, by refusing to follow a supervisor's order to fire a junior worker for discriminatory reasons."[65]

(iii.) Concurrence: Justice Alito's Concern About "Silent Opposition"

It was this "silent opposition" scenario that led Justice Alito to write a concurring opinion. Arguing that the Court's holding should be limited to "employees who testify in internal investigations or engage in analogous purposive conduct," Alito feared a dramatic increase in an already high number of EEOC retaliation claims.[66] Justice Alito's question concerning protection for silent opposition is interesting. There are several likely scenarios in which this issue might arise: retaliation against an employee who refuses to discriminate against subordinates; retaliation against an employee who might be a witness and fails to respond when asked about alleged harassment; preemptive discharge of an employee who is suspected of

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[59] *Id.*

[60] *Id.*

[61] *Id.* at 852.

[62] *Id.* at 853 n.3.

[63] *Id.* at 852.

[64] McDonnell v. Cisneros, 84 F.3d 256, 262 (7th Cir. 1996) (addressing situation where employer retaliated against employee who failed to prevent a subordinate from filing an EEOC charge).

[65] *Crawford*, 129 S. Ct. at 851.

[66] *Id.* at 853–55 (Alito, J., concurring) (citing EEOC statistics indicating that retaliation claims have doubled between 1992 and 2007 and stating, "An expansive interpretation of protected opposition conduct would likely cause this trend to accelerate.").

intending to file an EEOC charge or support a complainant. Since silent opposition was not central to the holding in *Crawford*, however, this issue will have to be addressed in another case.[67]

C. ANALYSIS

The message for employers is clear: An adequate internal investigation should include steps to protect employees who cooperate in good faith with the investigation and any contemplated adverse action against employees who revealed wrongdoing should be scrutinized closely before it is put into effect.

Few should be surprised by the outcome of this case. The "textualists" within the Court's conservative wing would have been hard-pressed to conclude that Congress intended a distinction to be drawn between employees who initiate a complaint and employees who voice a complaint in response to employer questioning. Even if the Court had affirmed the lower courts' holdings, it could be anticipated that Congress and the President would simply have responded by amending the statute, just as they have done recently with the ADA Amendments Act of 2008[68] and the Lilly Ledbetter Fair Pay Act of 2009.[69]

Crawford continues the Supreme Court's trend of limiting bases for summary judgment in Title VII cases. Since the enactment of the Civil Rights Act of 1991, the Court has issued a number of decisions that have disapproved of rules crafted by the lower courts to limit employers' exposure to civil rights laws. For example, the Court has rejected lower court rulings that imposed an extreme psychological injury requirement on harassment plaintiffs,[70] that disregarded biased and harassing statements by supervisors in a plaintiff's hostile work environment claim,[71] and that failed to consider plaintiffs' superior qualifications as evidence of pretext in a race discrimination case.[72] Indeed, there seems to be a clear trend that is continued by the Court's decision in *Crawford*.

It is possible that the Court's holding in *Crawford* will discourage employers from conducting an expansive investigation for fear that other employees, in the course of that investigation, may voice complaints of discriminatory conduct. Justice Souter was dismissive of

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[67] *See, e.g.*, Thompson v. N. Am. Stainless, 567 F.3d 804, 816 (6th Cir. 2009) (explaining that plaintiff's alleged firing due to girlfriend's complaint is not enough to invoke the opposition clause).

[68] Pub. L. No. 111-83, 122 Stat. 3553 (2008) (codified as amended in scattered sections of 42 U.S.C.).

[69] Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 and 42 U.S.C.).

[70] Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).

[71] Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

[72] Ash v. Tyson Foods, Inc., 546 U.S. 454 (2006).

such a scenario, however, and predicted that any disincentive is outweighed by the incentive to conduct a comprehensive investigation provided by *Ellerth* and *Faragher*.[73]

2. *AT&T Corp. v. Hulteen*[74]

A. CASE BACKGROUND

(i.) Issue and Context

The issue in *Hulteen* was whether an employer necessarily violated Title VII—in particular, the Pregnancy Discrimination Act of 1978 (PDA)[75]—by continuing to acknowledge differential seniority credit for pregnancy and disability leave that accrued before the PDA was passed.[76]

In *General Electric Corp. v. Gilbert*,[77] the Supreme Court had previously held that disability benefits plans that excluded disabilities related to pregnancy were "not sex-based discrimination within the meaning of Title VII."[78] *Gilbert* essentially made "differential treatment of pregnancy leave . . . lawful . . . ."[79] Congress responded by passing the PDA as an amendment to Title VII two years later. The Court interpreted the PDA as a "clear" statement that "treat[ing] pregnancy-related conditions less favorably than other medical conditions" was unlawful discrimination.[80] Prior to *Hulteen*, however, circuit courts were split as to whether an employer unlawfully discriminated by making post-PDA retirement calculations based in part upon pre-PDA accrual policies.[81]

(ii.) Facts of the Case

AT&T had a pension and other benefit plans that were based on the employee's length of service, which was measured as "the period of service at the company minus uncredited leave time."[82] Prior to 1977, AT&T gave full service credit to employees who took disability leave, but only a maximum of thirty days of credit to female employees who took a medical leave due to

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[73] Crawford v. Metro. Gov't of Nashville and Davidson County, Tenn., 129 S. Ct. 846, 851 (2009).

[74] 129 S. Ct. 1962 (2009).

[75] Pub. L. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k)).

[76] *Hulteen*, 129 S. Ct. at 1966.

[77] 429 U.S. 125 (1976).

[78] *Hulteen*, 129 S. Ct. at 1967.

[79] *Id.*

[80] Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983).

[81] *Compare* Pallas v. Pacific Bell, 940 F.2d 1324 (9th Cir. 1991) (finding such determinations to violate Title VII), *with* Leffman v. Sprint Corp., 481 F.3d 428 (6th Cir. 2007) (finding no Title VII violation), *and* Ameritech Benefit Plan Comm. v. Commc'n Workers of Am., 220 F.3d 814 (7th Cir. 2000) (finding no Title VII violation).

[82] *Hulteen*, 129 S. Ct. at 1966.

pregnancy.[83] Between 1977 and 1979, AT&T amended this policy to grant service credit for up to six weeks of pregnancy-related disability leave.

After the effective date of the PDA in 1979, AT&T amended its policies again. Its new disability plan "provided service credit for pregnancy leave on the same basis as leave taken for other temporary disabilities."[84] The plan did not grant additional service credit retroactively to those women who had been denied service credit for pregnancy-related disability leave taken prior to the passage of the PDA.[85]

Respondents, who each "received less service credit for pregnancy leave than she would have accrued on the same leave for disability," filed discrimination charges with the EEOC.[86] After the EEOC found "reasonable cause to believe that AT&T had discriminated," Respondents sued, alleging that the denial of full service credit prior to the PDA amounted to discrimination under Title VII.[87]

Following Ninth Circuit precedent,[88] the District Court for the Northern District of California ruled in favor of the Respondents.[89] The court found that AT&T's post-PDA benefit calculations, based on pre-PDA service credit rules affording less credit for pregnancy-related leave, violated Title VII.[90] The Ninth Circuit, sitting en banc, affirmed.[91]

B. SUPREME COURT

(i.) Decision and Holding

The Supreme Court, in a 7-2 opinion by Justice Souter, reversed the Ninth Circuit.[92] It held that "there is no necessary violation" of the PDA, and that AT&T's calculation of benefits was insulated from a Title VII challenge because the calculation was "part of a bona fide seniority system under § 703(h) of Title VII . . . ."[93]

Looking at AT&T's calculation system, the Court found no "intention to discriminate,"[94] even though the policy differentiated pregnant employees from other employees because, at the time of the policy's inception, such differential treatment was lawful under *Gilbert*.

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[83] *Id.* at 1967.
[84] *Id.*
[85] *Id.* at 1971.
[86] *Id.* at 1967.
[87] *Id.*
[88] *See* Pallas v. Pacific Bell, 940 F.2d 1324 (9th Cir. 1991).
[89] AT&T Corp. v. Hulteen, 498 F.3d 1001, 1001 (9th Cir. 2007).
[90] *Id.* at 1005.
[91] *Id.* at 1015.
[92] *Hulteen*, 129 S. Ct. at 1973.
[93] *Id.* at 1966.
[94] *Id.* at 1969 (quoting 42 U.S.C § 2000e-2(h) (2006)).

The Court rejected Hulteen's argument that AT&T's seniority system was facially discriminatory from the start, reasoning that this would require retroactive application of the PDA.[95] There is a presumption against retroactive application of statutes,[96] and the Court found "no indication at all that Congress had retroactive application in mind" when drafting the PDA.[97]

The Court also rejected Hulteen's argument that AT&T's decision not to award retroactive service credit for her pre-PDA leave was facially discriminatory at the time of her post-PDA retirement. The Court stated that "[i]f a choice to rely on a favorable statute turned every past differentiation into contemporary discrimination, [the exemption for seniority systems under] subsection (h) [of Title VII] would never apply."[98]

Finally, the Court considered whether the recently enacted amendments to Title VII—known as the Lilly Ledbetter Fair Pay Act—dictated a different result.[99] Under the Ledbetter Act, a violation of Title VII occurs "when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice . . . ."[100] The Court held that, because AT&T's system was lawful at its inception, Hulteen was not "affected by application of a discriminatory compensation decision or other practice."[101]

(ii.) Dissenting Opinion

Justice Ginsburg, joined by Justice Breyer, dissented.[102] In light of Congress's express repudiation of the *Gilbert* decision through the PDA, Ginsburg believed that any present effects of pre-PDA discriminatory practices create a current violation of Title VII.[103] She called on the Court to expressly overrule *Gilbert*, "so that the decision can generate no more mischief."[104]

C. ANALYSIS

The practical impact of *Hulteen* for employers may be very limited. As long as an employer's seniority system was legal at its inception and was adjusted accordingly to meet its ongoing obligations under Title VII, an employer can continue paying benefits under that system even if the system perpetuates the effects of decisions that have since become unlawful. Whether and to what extent employers are administering such systems remains unknown.

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[95] *Id.* at 1970.
[96] *Id.* at 1971 (citing Landgraf v. USI Film Prods., 511 U.S. 244 (1994)).
[97] *Id.*
[98] *Id.* at 1972.
[99] *Id.* at 1972–73.
[100] *Id.* at 1973 (quoting Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111-2, § 3(A), 123 Stat. 5, 5–6 (2009)).
[101] *Id.*
[102] *Id.*
[103] *Id.* at 1980 (Ginsburg, J., dissenting).
[104] *Id.*

It is possible, however, that Congress will consider overruling the Court's decision, as it did in the Lily Ledbetter Fair Pay Act, which reversed the Court's decision in *Ledbetter v. Goodyear Tire & Rubber Company*.[105] Thus, the most noteworthy and significant developments following *Hulteen* may occur not in the lower courts but in the legislative branch.

B. ERISA

1. *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan*[106]

A. CASE BACKGROUND

(i.) Issues and Context

In *Kennedy*, the Court addressed two main issues. First, whether the common law waiver of savings and investment plan (SIP) benefits that was signed as part of a divorce decree was ineffective because it invoked ERISA's anti-alienation provision,[107] even though the divorce decree was not a qualified domestic relations order (QDRO).[108] Second, whether, in any event, the administrator acted consistently with ERISA by paying the SIP benefits in question, consistent with the beneficiary designation under the plan instruments.[109]

(ii.) Facts of the Case

William Kennedy was employed by DuPont and participated in their savings and investment plan (SIP) under ERISA.[110] In 1974, he signed a form designating his wife, Liv Kennedy, the beneficiary under his SIP. In 1994, the Kennedys divorced subject to a decree that purported to divest Liv Kennedy of all rights under William Kennedy's employment benefit programs. Although William Kennedy changed the designated beneficiary of his pension to his daughter, Kari, he neglected to change the beneficiary of his SIP.

When William Kennedy died in 2001, Kari Kennedy asked that the SIP, worth $400,000, be paid to the estate. DuPont, however, followed the designation form specified in the plan and paid the SIP to Liv Kennedy. Kari Kennedy sued on behalf of the estate as the administrator of the will.

(iii.) Lower Courts

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[105] 550 U.S. 618, 641–42 (2007).
[106] 129 S. Ct. 865 (2009).
[107] 29 U.S.C. § 1056(d)(1) (2006).
[108] *Kennedy*, 129 S. Ct. at 868.
[109] *Id.* at 874–75.
[110] *Id.* at 868.

The District Court ruled for the estate, holding that a beneficiary could waive his or her right to benefits if the waiver was "explicit, voluntary, and made in good faith."[111] The Fifth Circuit reversed, holding that Liv Kennedy's waiver was an assignment or alienation under ERISA's anti-alienation provision, and thus could not be honored.[112] Therefore, the Fifth Circuit found that DuPont acted consistently with ERISA in paying the SIP to her.[113]

B. SUPREME COURT

The Court affirmed the Fifth Circuit's holding that the SIP benefits were properly paid to Liv Kennedy, "albeit on reasoning different from the Fifth Circuit's rationale."[114] The Court differed from the Fifth Circuit in first holding, unanimously, that Liv Kennedy's waiver was effective.[115] However, it also held that DuPont acted consistently with ERISA by paying the SIP benefit consistently with the beneficiary designation under the plan instruments.[116]

Under section 1056(d)(1) of ERISA, benefits cannot be "assigned" or "alienated" unless by a qualified domestic relations order.[117] Liv Kennedy's waiver was not an assignment or alienation under the normal meaning of those terms since she did not assign them to anyone.[118] Therefore, her waiver was valid.[119]

Nonetheless, this waiver did not bind DuPont.[120] ERISA requires that each plan "be established and maintained pursuant to a written instrument" and that the plan administrator is required to act "in accordance with the documents and instruments governing the plan."[121] The administrator's obligation to follow plan documents dominates over state law or federal common law.[122] DuPont, acting as administrator, fulfilled its obligation under ERISA by paying benefits to Liv in accordance with William's designation in the plan documents, despite the common law waiver.[123]

C. ANALYSIS

The Court's decision in *Kennedy* gives clear directions to plan managers on how to deal with the consequences of a beneficiary's divorce. The Court appeared to proclaim a "bright-line

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[111] *Id.*

[112] Kennedy v. Plan Adm'r for DuPont Savings & Inv. Plan, 497 F.3d 426, 429 (5th Cir. 2007).

[113] *Id.* at 432.

[114] *Kennedy*, 129 S. Ct. at 870.

[115] *Id.* at 873.

[116] *Id.* at 875.

[117] *Id.* at 870. *See also* 29 U.S.C. § 1056(d)(1) (2006).

[118] *Id.*

[119] *Id.* at 873.

[120] *Id.* at 874–75.

[121] *Id.* at 875 (quoting 29 U.S.C. §§ 1102(b)(4), 1104(a)(1)(D) (2006)).

[122] *Id.* at 876–77.

[123] *Id.* at 878.

requirement" that plan documents determine plan distributions.[124] In general, the Court said, an administrator must simply "look at the plan documents and records conforming to them" to find out who is to be paid the benefits; there is no need, it added, to go to court for the answer.[125]

In reaching this ruling, the Court resolved two conflicts that had built up in lower courts concerning spousal rights after divorce. First, the Court made it clear that a former spouse can give up the right to benefits as part of a divorce decree. Second, the Court held that the ultimate question of whether the ex-spouse was entitled to the benefits is to be decided by the specific terms of the plan—in short, by what the documents say.

The victory for ex-spouses in Liv Kennedy's situation, though, may not be complete. In a footnote, the Court explicitly said that it was leaving open the question of whether the estate could have sued to recover the benefits from Liv after she received them.[126] The Court cited prior rulings that seemed to say that a prior contractual agreement to forfeit funds may be enforceable after the distribution without violating ERISA; once the money is paid out, it loses its ERISA protection.[127]

C. Public Sector Labor Law Cases

1. *Locke v. Karass*[128]

A. CASE BACKGROUND

(i.) Issue and Context

This case addressed whether the First Amendment permits national litigation to be considered a chargeable cost in the context of nonmember union service fees.[129] It dealt with a local union that required nonmembers to pay a service fee, a portion of which was "use[d] to pay for litigation expenses incurred in large part on behalf of *other* local units."[130]

Supreme Court precedent was extremely important in *Locke*, because "[p]rior decisions of [the] Court frame[d] the question before [the Court]."[131] Three prior cases established what the Court deemed "a general First Amendment principle" that public and private labor unions

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[124] *Id.* at 876.
[125] *Id.*
[126] *Id.* at 875 n.10.
[127] *Id.* (citing Boggs v. Boggs, 520 U.S. 833, 853 (1997); Sweebe v. Sweebe, 712 N.W.2d 708, 712–13 (Mich. 2006); Pardee v. Pers. Representative for the Estate of Pardee, 112 P.3d 308, 313–16 (Okla. Civ. App. 2004)).
[128] 129 S. Ct. 798 (2009).
[129] *Id.* at 801–02.
[130] *Id.* at 802 (emphasis in original).
[131] *Id.* at 803.

could charge non-member employees a service fee as a condition of employment.[132] Two later cases "refined" that principle[133] and "ma[d]e clear" that certain expenses are permitted while others are not.[134] Charges not permitted were those related to "political or ideological activities."[135] Charges that were permitted were those "for activities more directly related to collective bargaining."[136] The Court has justified this distinction by citing "government's interest in preventing freeriding . . . and in maintaining peaceful labor relations."[137]

In *Abood v. Detroit Board of Education*, the Court relied on *Railway Employes v. Hanson* and *Machinists v. Street* in finding that "the furtherance of the common cause leaves some leeway for the leadership of the group."[138] The First Amendment challenge brought in *Abood* focused on the interference of service fees "with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit."[139] The Court held that "such interference . . . is constitutionally justified by the . . . important contribution of the union shop to the system of labor relations established by Congress."[140]

The two Supreme Court cases that refined this principle were *Ellis v. Railway Clerks*[141] and *Lehnert v. Ferris Faculty Association*.[142] In *Ellis*, the Court defined a constitutionally permissible fee as one relating to "expenditures [that] are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues."[143] This definition included "the direct costs of negotiating and administering a collective-bargaining contract," as well as "the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit."[144] The examples the Court gave of chargeable expenses were those related to national conventions, social activities, and publications (at least the part of publications that were not political). The Court justified this conclusion by stating that a local union's "corporate or associational existence" must be maintained in order for it to function effectively.[145]

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[132] *Id.* (citing Railway Employes v. Hanson, 351 U.S. 225 (1956); Machinists v. Street, 367 U.S. 740 (1961); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)).

[133] *Id.* at 803–04 (citing Ellis v. Railway Clerks, 466 U.S. 435 (1984); Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991)).

[134] *Id.* at 803.

[135] *Id.*

[136] *Id.*

[137] *Id.* (citing *Street*, 367 U.S. at 768–72; *Hanson*, 351 U.S. at 233–38).

[138] 431 U.S. at 222–23 (quoting *Street*, 367 U.S. at 778 (Douglas, J., concurring)).

[139] *Id.*

[140] *Id.*

[141] 466 U.S. 435 (1984).

[142] 500 U.S. 507 (1991).

[143] 466 U.S. at 448.

[144] *Id.*

[145] *Id.*

The *Ellis* opinion also addressed litigation costs.[146] The distinction the Court drew between permissible and non-permissible litigation costs was similar to that drawn between other union expenses.[147] The *Locke* Court thus invoked *Ellis* for the principle that permissible costs were those "litigation expenses incidental to the local union's negotiation or administration of a collective-bargaining agreement, fair representation litigation, jurisdictional disputes, or other litigation normally conducted by an exclusive representative."[148] The non-permissible costs were those expenses of litigation "not having such connection with the bargaining unit . . . ."[149]

The scope of the Court's two-part holding in *Lehnert*, however, became the primary dispute between the parties in *Locke*.[150] The first part of the *Lehnert* holding established that "a chargeable expenditure must bear an appropriate relation to collective-bargaining activity.[151] The main issue, though, was whether nonmembers could be charged for activities that were closely related to collective bargaining, but were "not undertaken directly on behalf of the bargaining unit to which the objecting employees belong."[152] The *Lehnert* Court did not directly resolve this issue.

Five of the justices in *Lehnert* held that a local union was permitted to charge nonmembers "for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit."[153] *Lehnert* rejected the argument that a "direct relationship" was required between the costs and a "tangible benefit" to the local union, finding that this approach would "ignore the unified-membership structure" of unions.[154] Rather than requiring a direct relationship, the *Lehnert* majority required only that the costs be "for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization."[155] The benefits the majority mentioned related to the "considerable economic, political, and informational resources" that the national union could provide for its local affiliates.[156]

On the topic of national litigation costs, "the [*Lehnert*] Court split into three irreconcilable factions."[157] One faction of four justices stated that national litigation could be considered an "expressive" activity that was "more akin to lobbying," even though the "precedent established through litigation on behalf of one unit may ultimately be of some use to

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[146] *Id.* at 453.
[147] *Id.* at 448–53.
[148] Locke v. Karass, 129 S. Ct.798, 804 (2009) (citing *Ellis*, 446 U.S. at 453).
[149] *Id.*
[150] *Id.* at 805–06.
[151] *Lehnert*, 500 U.S. 507, 519 (1991).
[152] *Id*.
[153] *Id.* at 524, *quoted in Locke*, 129 S. Ct. at 805.
[154] *Id.* at 522–23, *quoted in Locke*, 129 S. Ct. at 805.
[155] *Id.* at 524, *quoted in Locke*, 129 S. Ct. at 805.
[156] *Id.* at 523, *quoted in Locke*, 129 S. Ct. at 805.
[157] Locke v. Karass, 129 S. Ct.798, 804 (2009)

another unit."[158] Another faction of four justices stated that including national litigation costs in the service fee violated the First Amendment, "except when those costs pay for specific services 'actually provided' to the local."[159] This faction would have required the same direct relationship between costs and benefits that the majority rejected. The final faction, consisting only of Justice Marshall, rejected the idea that national litigation costs were "*per se* nonchargeable," and pointed out that the Court failed to directly resolve this issue, because the plurality's approach was merely dicta.[160]

The Court's conflicting treatment of the chargeability of national litigation costs in *Lehnert* naturally led to "uncertainty among the Circuits."[161] It was this issue that was central to the Court's decision in *Locke*.

(ii.) Facts of the Case

The dispute in *Locke* centered on a collective bargaining agreement between the State of Maine and the Maine State Employees Association.[162] The service fee at issue in this agreement "include[d] a charge that represents the affiliation fee the local pa[id] to its national union."[163] While the union did not require nonmembers to pay any portion of the fee that would be used for nonchargeable activities of the national union, its fee did include "an amount that helps the national pay for litigation activities."[164]

The nonmember petitioners challenged the constitutionality of this fee, because some of the national litigation costs "d[id] not *directly* benefit Maine's state employees' local but rather directly benefit[ed] other locals or the national organization itself."[165] Even though the actual costs per nonmember were "small," petitioners challenged the fee because they "believed the principle [was] important." [166]

However, the portion of the fee that went to national litigation costs only included "activities that are of a chargeable kind."[167] In other words, nonmembers were not required to pay for national litigation that was aimed at promoting the national union's political or ideological goals.

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[158] *Lehnert*, 500 U.S. at 528.

[159] *Locke*, 129 S. Ct. at 805 (quoting *Lehnert*¸ 500 U.S. at 561 (Scalia. J., concurring and dissenting in part)).

[160] *Id.* (citing *Lenhart,* 500 U.S. at 544–47 (Marshall, J., concurring and dissenting in part)).

[161] *Id.* at 803 (citing Otto v. Pa. State Educ. Ass'n-NEA, 330 F.3d 125 (3d Cir. 2003); Pilots Against Illegal Dues v. Air Line Pilots Ass'n, 938 F.2d 1123 (10th Cir. 1991)).

[162] *Id.* at 802.

[163] *Id.*

[164] *Id.*

[165] *Id.* (italics in original).

[166] *Id.* at 802–03.

[167] *Id.* at 802.

(iii.) Lower Courts

Petitioners' challenge was first addressed by an arbitrator, who "found all aspects of the service fee lawful."[168] Then, petitioners brought suit in federal court, "claim[ing] that the First Amendment prohibits charging them for any portion of the service fee that represents . . . 'national litigation,' *i.e.*, litigation that does not directly benefit the local."[169] Maine's district court found "no material facts at issue, [and] upheld [the national litigation] element of the fee."[170] On appeal, the First Circuit affirmed.[171]

B. SUPREME COURT

The Supreme Court resolved this issue by relying on its previous holdings in *Hanson*, *Street*, *Abood*, *Ellis*, and *Lehnert*.[172] Specifically, it turned to the standards set forth by the *Lehnert* majority.[173] Though *Lehnert*'s holding was limited to "other national expenses," the Court in *Locke* believed that "logic suggests that the same standard should apply to national litigation."[174] It held that national litigation costs are chargeable when the two following circumstances are met:

> (1) the subject matter of the national litigation bears an appropriate relation to collective bargaining and (2) the arrangement is reciprocal—that is, the local's payment to the national affiliate is for "services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization."[175]

The Court rejected petitioners' arguments, which relied upon a mistaken application of *Ellis* and *Lehnert*.[176] It viewed *Ellis* as not being on point.[177] Because "the *Ellis* court focused upon a local union's payment of national litigation expenses *without any understanding as to reciprocity*," the Court there did not touch on the central issue in *Locke*.[178] *Lehnert* was deemed similarly inapplicable, because "the plurality could not (and did not) decide whether an understanding as to reciprocity produced the relationship necessary for chargeability."[179] Even if it had, the Court reasoned, "a plurality does not speak for the Court as a whole."[180] Therefore, the Court's precedent was "ambiguous on the point at issue."[181]

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[168] *Id.* at 803.
[169] *Id.*
[170] *Id.* (citing Locke v. Karass, 425 F. Supp. 2d 137 (D. Me. 2006)).
[171] Locke v. Karass, 498 F.3d 49 (1st Cir. 2007).
[172] *Locke*, 129 S. Ct. at 803–06.
[173] *Id.* at 804–07.
[174] *Id.* at 806.
[175] *Id.* (quoting Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 524 (1991)).
[176] *Id.*
[177] *Id.*
[178] *Id.* at 806 (emphasis in original).
[179] *Id.* at 807.
[180] *Id.*
[181] *Id.*

Applying its two-part test, the Court deemed the national litigation costs in the Maine collective bargaining agreement chargeable.[182] First, it found that the costs bore an appropriate relation to collective bargaining. The Court reached this conclusion because the agreement charged nonmembers only for "the *kind* of national litigation activity" that the courts had previously deemed chargeable.[183] In other words, the national litigation costs "were comparable to those undertaken by the local and which the local deemed chargeable."[184] Second, it found that the costs established a reciprocal arrangement. Although "the existence of reciprocity [was] assumed by the parties and not . . . in dispute," the Court still applied the second part of the test to the agreement.[185] It reasoned that the service fee gave the union "general access to the national's financial resources . . . 'which would not otherwise be available to the local union when needed to effectively negotiate, administer or enforce the local's collective bargaining agreements.'"[186] The Court deemed this the type of activity which "'may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.'"[187] As a result of this analysis, the Court held that the national litigation costs in the agreement were "both appropriately related to collective bargaining and reciprocal."[188] Therefore, "those expenses are chargeable."[189]

2. *Ysursa v. Pocatello Education Association*[190]

A. CASE BACKGROUND

(i.) Issue and Context

The issue before the Court was whether Idaho's ban on payroll deductions for political activities, as it applied to local government employers, infringed unions' First Amendment rights. Two cases provide helpful context to the Court's resolution of this issue.

In *Davenport v. Washington Education Association*,[191] a statute required consent from nonunion members before fees could be used for political activities. The statute did not require consent before fees could be used for other, non-election-related, purposes.[192] The union argued that statute infringed their First Amendment rights, but the Court disagreed. Though content-

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[182] *Id.*

[183] *Id.* (emphasis in original).

[184] *Id.* (quotations and citations omitted).

[185] *Id.* at 808 (Alito, J., concurring). Justice Alito's concurring opinion pointed out that this assumption meant that the majority "[did] not reach the question of what 'reciprocity' means," and did not establish what is required to show that services do actually inure to the local members' benefit. *Id.*

[186] *Id.* at 807 (majority opinion) (citation omitted).

[187] *Id.* (quoting Lehnhert v. Ferris Faculty Ass'n, 500 U.S. 507, 524 (1991)).

[188] *Id.*

[189] *Id.*

[190] 129 S. Ct. 1093 (2009).

[191] 551 U.S. 177 (2007).

[192] *Id.* at 181–82.

based speech restrictions are "presumptively invalid" and subject to strict scrutiny, the Court found no such restrictions and applied rational basis review instead.[193] The Court held that the statute merely declined to assist union speech—rather than suppressing it—and that the State's action was reasonable in light of its interests in preserving the integrity of the political process.[194]

In *Consolidated Edison Company of New York v. Public Services Commission of New York*,[195] a state commission attempted to prohibit a private utility company from distributing leaflets addressing controversial environmental issues. The Court's analysis of the First Amendment issue hinged upon the relationship of the State and the state-regulated utility. It determined that the utility was a private entity, entitled to constitutional protection, and that the state's regulatory control over the utility did not authorize the prohibition at issue. Therefore, the prohibition infringed the utility's First Amendment rights.

(ii.) Facts of the Case

Idaho's Right to Work Act allows private and public sector employers to deduct union fees from employee paychecks, as long as the employees have provided their written authorization.[196] In 2003, the Idaho legislature enacted the Voluntary Contributions Act (VCA), which amended the Right to Work Act.[197] The VCA prohibited payroll deductions for political purposes.[198] This meant that a portion of the previously deductible union fees were excluded from the payroll deduction process.

The Pocatello Education Association (PEA)—a group of Idaho public employee unions—sued several state officers in their official capacities, alleging that the VCA's prohibition violated the First Amendment to the United States Constitution.[199]

(iii.) Lower Courts

The proceedings at the federal trial court level narrowed the issue.[200] The District Court for the District of Idaho held that the VCA was constitutional as applied to state government, but unconstitutional as applied to private employers and local governments.[201] The distinction was based on the fact that the state government did not provide subsidies to private employers or local governments to administer their payroll deductions.[202]

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[193] *Id.* at 188–90.
[194] *Id.*
[195] 447 U.S. 530 (1980).
[196] Ysursa v. Pocatello Educ. Ass'n, 129 S. Ct. 1093, 1096 (2009).
[197] *Id.*
[198] *Id.*
[199] *Id.* at 1097.
[200] Pocatello Educ. Ass'n v. Heideman, No. CV-03-0256-E-BLW, 2005 WL 3241745 (D. Idaho Nov. 23, 2005).
[201] *Id.* at *2.
[202] *Id.* at *6.

The parties' strategies on appeal narrowed the issue further. "Neither party challenged the District Court's rulings as to private and state-level employees, and therefore the only issue remaining concerned application of the ban to local government employees."[203] The Court of Appeals for the Ninth Circuit upheld the district court's decision. Relying on *Consolidated Edison*, the court analogized the state-government/local-government relationship to the state-government/regulated-private-utility relationship and found that Idaho had no control over the payroll deductions at the local government level.[204] The court found that Idaho's interests did not meet strict scrutiny and thus held the VCA unconstitutional as applied to local governments.[205]

B. SUPREME COURT

(i.) Arguments Before the Court

The unions argued that the VCA's ban "singles out political speech for disfavored treatment."[206] Relying on *Davenport*, they asserted that the ban was thus "presumptively invalid" and subject to strict scrutiny.[207] The unions further argued that strict scrutiny "is still warranted when the ban is applied to local government employers."[208] At the local level, Idaho was not merely declining to promote speech, but was instead violating the First Amendment by infringing speech through the local government's payroll deduction systems.[209]

Idaho argued that the VCA's ban did not target any specific speech, but rather operated as an across-the-board prohibition on all political payroll deductions. Asserting that the VCA should be analyzed under rational basis review, Idaho argued that "the State's interest in avoiding the appearance that carrying out the public's business is tainted by partisan political activity" was reasonable.[210]

(ii.) Decision and Holding

The Supreme Court reversed the Ninth Circuit and held that the VCA was constitutional as applied to local governments.[211] The Court's three-part analysis determined that (1) the VCA, in merely "declining to promote" speech, merited rational basis review; (2) the VCA clearly served Idaho's legitimate interests; and (3) the same review applies to local government subdivisions within Idaho's state government.

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[203] *Ysursa*, 129 S. Ct. at 1097.
[204] Pocatello Educ. Ass'n v. Heideman, 504 F.3d 1053, 1063–65, 1068 (9th Cir. 2007).
[205] *Id.* at 1068.
[206] *Ysursa*, 129 S. Ct. at 1098.
[207] *Id.*
[208] *Id.* at 1100.
[209] *Id.*
[210] *Id.* at 1096.
[211] *Id.* at 1101.

The Court first determined that Idaho, through the VCA, "has not infringed the unions' First Amendment rights."[212] This determination rested upon the Court's distinction between government action that abridges speech and action that declines to promote speech. The First Amendment protects the former but not the latter. "[I]t does not confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression."[213] Finding that the unions are still free to engage in protected speech and "simply are barred from enlisting the State in support of that endeavor," the Court concluded that the VCA was "not an abridgment of the unions' speech."[214]

Because the Court found no First Amendment infringement, it next rejected strict scrutiny in favor of rational basis review.[215] Idaho's asserted interests in enacting the VCA were to "avoid[] the reality or appearance of government favoritism or entanglement with partisan politics," and to "distinguish[] between internal governmental operations and private speech."[216] The Court had no problem determining that these interests were reasonable. Relying almost entirely on *Davenport* in resolving this issue, it held that the VCA's prohibition "plainly serves the State's interest."[217]

The Court's final step was to address the purported distinction between the state government and its political subdivisions. It found the Ninth Circuit's analogy to regulated private utilities "misguided."[218] The Court instead characterized local governments as "subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions."[219] These subordinate political subdivisions do not enjoy the same constitutional protections as private corporations. Therefore, the Court applied "the same deferential review" to the VCA at the local level.[220] Not surprisingly, it held that the VCA's prohibition also furthered Idaho's interests at this level.

(iii.) Justice Ginsburg's "Classification Question"

Justice Ginsburg wrote a concurring opinion, arguing that the issue before the Court was narrower than the one decided. Hers was a "classification question": "should the Court align local-government employment with private-sector employment or with state-level employment?"[221] Limiting her answer to the specific context of this case, Ginsburg found that "the Constitution compels no distinction between state and local governmental entities."[222]

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[212] *Id.* at 1098.
[213] *Id.* at 1096.
[214] *Id.* at 1098.
[215] *Id.*
[216] *Id.* at 1098–99.
[217] *Id.* at 1099.
[218] *Id.* at 1101.
[219] *Id.* at 1100 (quoting Reynolds v. Sims, 377 U.S. 533, 575 (1964)).
[220] *Id.* at 1100.
[221] *Id.* at 1101 (Ginsburg, J., concurring).
[222] *Id.* at 1102.

(iv.) Justice Breyer's Intermediate Scrutiny: A Proportionality Inquiry

Justice Breyer wrote an opinion concurring in part and dissenting in part. He agreed with the Court's statement that a constitutional distinction existed between "abridging" speech and "declining to promote" speech. However, he found this distinction "more metaphysical than practical."[223] Rather than focusing on this bright-line distinction—which would lead either to strict scrutiny or rational basis review—he suggested a more nuanced analysis. He found this approach appropriate here, where the State action "indirectly" affects speech.[224]

Breyer proposed a form of "intermediate scrutiny" that involved "proportionality questions."[225] He suggested that the Court propose the following inquiry:

(1) What is "the seriousness of the speech-related harm the provision likely cause"?
(2) What is "the importance of the provision's countervailing objectives"?
(3) What is "the extent to which the statute will tend to achieve those objectives"?
(4) Are "there are other less restrictive ways of doing so"?[226]

The aim of this inquiry should be to "determine[] whether ultimately the statute works speech-related harm that is out of proportion to its justifications."[227] Because Breyer was "not clear" about whether the VCA "operate[d] even handedly," he would have remanded the cases for a decision on this issue.[228]

(v.) Justice Stevens's Legislative Intent Argument

Justice Stevens's dissenting opinion focused primarily on the intent of the Idaho legislature in enacting the VCA. He conceded that the VCA was facially neutral. However, his examination of the statutory context revealed the VCA's "discriminatory purpose."[229] Stevens determined that "the restriction was more narrowly intended to target union fundraising" by showing that the VCA and the Right to Work Act "pertain exclusively to unions" and were "directed at union activities."[230] He also pointed to the breadth of the VCA, which was enacted to apply to private as well as public employers, as being incompatible with Idaho's asserted interests. Concluding that the VCA was "clear[ly] . . . intended to make it more difficult for

[223] *Id.* (Breyer, J., concurring in part and dissenting in part).
[224] *Id.* at 1103 (finding that the VCA "restrict[s] a channel through which speech-supporting finance might flow.").
[225] *Id.*
[226] *Id.*
[227] *Id.*
[228] *Id.* at 1104.
[229] *Id.* at 1106 (Stevens, J., dissenting).
[230] *Id.* at 1105.

unions to finance political speech," Stevens held the statute "unconstitutional in all its applications."[231]

(vi.) Justice Souter's Dilemma: "Reasonable Suspicion of Viewpoint Discrimination"

Justice Souter's dissenting opinion asserted that the Court should have never granted the writ of certiorari. Based on the narrow issue before the Court and the litigation strategy of the parties, Souter warned against this case serving "as a vehicle to refine First Amendment doctrine."[232] Looking to the statutory context and relying on Justice Stevens's analysis, Souter concluded that "[u]nion speech, and nothing else, seems to have been on the legislative mind."[233] Dealing with this "reasonable suspicion of viewpoint discrimination" presented a unique "dilemma" for the Court.[234]

Souter's point was that this dilemma was not before the Court. The unions' litigation strategy—conceding the constitutionality as it applied to the State, and focusing narrowly on the state-government/local-government distinction—precluded the Court from properly addressing "the elephant in the room."[235] Souter argued that, by "shut[ting their] eyes" to this dilemma, the Court risked ignoring "the specter of another First Amendment category, one of superior significance, . . . too insistent to ignore."[236]

III. Close Cases

Not surprisingly, the greatest legal and public scrutiny attached to the three close cases of this Term. Each of these three cases made important contributions to the law.

A. Private Sector Labor Law

1. *14 Penn Plaza LLC v. Pyett*[237]

A. CASE BACKGROUND

(i.) Issue and Context

The issue in *14 Penn Plaza* was whether a specific provision in a collective bargaining agreement was enforceable. The provision "clearly and unmistakably" required union members to submit individual statutory discrimination claims to an arbitration process.

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[231] *Id.*
[232] *Id.* at 1109 (Souter, J., dissenting).
[233] *Id.* at 1108.
[234] *Id.* at 1109.
[235] *Id.*
[236] *Id.* at 1109.
[237] 129 S. Ct. 1456 (2009).

The claims at issue arose under the Age Discrimination in Employment Act (ADEA), which "prohibits employers and unions from discriminating against persons over the age of 40 with respect to any term, condition, or privilege of employment."[238] Also at issue was the scope of the Federal Arbitration Act (FAA), which states that "an agreement in writing to submit to arbitration an existing controversy arising out of . . . a contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[239]

Prior to this case, the majority of circuit courts agreed that a union was *not* free to waive an individual employee's statutory discrimination claims through binding arbitration under a collective bargaining agreement. This position seemed justified in light of the Supreme Court's decision in *Alexander v. Gardner-Denver Co*.[240]

In *Gardner-Denver*, an employee claimed that he was discharged in violation of the "just cause" provision of the collective bargaining agreement.[241] The employee also claimed that his discharge was motivated by racial discrimination, and thus violated Title VII of the Civil Rights Act of 1964. After the agreement's arbitration procedure yielded no relief for the employee, he brought a claim in federal court. Both the District Court and the Court of Appeals rejected the claim, finding that the employee was bound by the arbitrator's decision. The Supreme Court reversed, however, and held that the employee was entitled to pursue his statutory rights independent of the confines of the collective bargaining agreement. The opinion also questioned whether the arbitration forum was an appropriate setting for resolution of statutory (as opposed to contractual) rights.

In the years since *Gardner-Denver*, though, the Court's opinion of arbitration as a mechanism for resolving employment disputes has changed. *Gilmer v. Interstate/Johnson Lane Corp.*,[242] held that the FAA covered arbitration provisions in individual employment contracts "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."[243] The FAA's scope was extended by *Circuit City Stores v. Adams*,[244] which reaffirmed that "arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law."[245] Despite the trend in federal courts favoring arbitration, the collective waiver of individual statutory rights was not taken lightly. In *Wright v. Universal Maritime Service Corp.*,[246] the Supreme Court explicitly addressed the topic of waiver and held that, in order for a court to conclude that an individual had waived his right to

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[238] Brief for Respondent at 3, 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009) (No. 07-581) (citing 29 U.S.C. § 623).

[239] 9 U.S.C. § 2 (2006).

[240] 415 U.S. 36 (1974).

[241] *Id.*

[242] 500 U.S. 20 (1991).

[243] *Id.* at 26.

[244] 532 U.S. 105 (2001).

[245] *Id.* at 123.

[246] 525 U.S. 70 (1998).

adjudicate statutory claims, this waiver must be "clear and unmistakable."[247] The question at the heart of *14 Penn Plaza* was whether unions could also bargain away their members' individual statutory rights.

(ii.) Facts of the Case

This case dealt mainly with one provision of a collective bargaining agreement. The parties to the agreement were the Realty Advisory Board on Labor Relations (RAB)—a multi-employer bargaining association consisting of members of the New York City real estate industry—and Service Employees International Union Local 32BJ. Petitioner 14 Penn Plaza was a member of the RAB. Respondents were three former members of the union employed by Temco, a third-party contractor, as night watchmen and porters in 14 Penn Plaza's commercial office building in New York City.

The parties agreed in 1999 to the provision at issue—Section 30 of the agreement. This provision barred discrimination against employees on various grounds, including age discrimination under the ADEA. It also required employees to submit any statutory discrimination claims to binding arbitration under the agreement's grievance and dispute resolution procedures. These procedures were deemed "the sole and exclusive remedy for violations."[248] The agreement also instructed arbitrators to "apply appropriate law in rendering decisions based upon claims of discrimination."[249]

In 2003, 14 Penn Plaza hired a new security services contractor, which meant it no longer needed Temco's services. The union agreed to this decision. At that time, respondents "were the only building employees over 50 years old."[250] Temco reassigned them to new positions at different locations. The employees claimed that the new positions were undesirable for several reasons, including lower wages.

The union filed a grievance on behalf of respondents, alleging that the change violated the collective bargaining agreement. The grievance initially alleged that the petitioner's decision violated Section 30, but the union later withdrew this claim.[251] Respondents requested that the union take their statutory discrimination claims to arbitration, but the union refused. Respondents filed a complaint with the Equal Employment Opportunity Commission (EEOC); the EEOC dismissed the complaint, but issued respondents "right to sue" letters.

(iii.) Lower Courts

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[247] *Id.* at 80.

[248] 14 Penn Plaza v. Pyett, 129 S. Ct. 1456, 1461 (2009).

[249] *Id.*

[250] Brief for Respondent, *14 Penn Plaza*, *supra* note 238, at 5.

[251] The union felt that it could not legitimately pursue the antidiscrimination claim after it had consented to 14 Penn Plaza's decision to use the new contractor. The union continued to arbitrate respondent's seniority and overtime claims, but the arbitrator denied these claims. *14 Penn Plaza*, 129 S. Ct. at 1462.

Respondents filed a statutory age discrimination complaint against 14 Penn Plaza in the Southern District of New York, alleging violation of the ADEA. 14 Penn Plaza filed a motion to compel arbitration, but this motion was denied by the District Court. The Second Circuit, bound by its own precedent and Supreme Court precedent, affirmed.[252] The Court of Appeals acknowledged the tension between *Gardner-Denver* and *Gilmer*, but held that collective bargaining provisions requiring arbitration of individual statutory claims were unenforceable. The Supreme Court granted certiorari "to address the issue left unresolved in *Wright*, which continues to divide the Courts of Appeals."[253]

B. SUPREME COURT

(i.) Arguments Before the Court

The parties differed over whether the union was authorized to agree, on behalf of its members, to arbitrate statutory claims. Respondents argued that the National Labor Relations Act (NLRA) authorizes unions to waive employees' "collective and economic rights" but not "individual, non-economic rights, such as those under the federal antidiscrimination statutes."[254] They claimed that the latter are unwaivable, because "[t]hey devolve on petitioners as individual workers, not as members of a collective organization."[255] Rather than confronting this position directly, petitioners described the arbitration provision not as a waiver of any substantive right but rather as waiver "only of a judicial forum for discrimination claims."[256] They argued that selection of dispute resolution mechanisms "is a core example of a 'term or condition of employment' . . . and an appropriate subject for bargaining by the union."[257]

Since the individual right at issue was linked to a specific statute, a central part of this debate centered on what Congress intended in passing the ADEA. Respondents argued that Congress provided "overlapping remedies" under the ADEA[258] and imposed strict requirements on the waiver of these statutory rights. They turned to the legislative history as proof that "Congress intended to encourage arbitration only where an individual voluntarily waived his right to proceed in court."[259] Claiming that the employees here did not waive their rights knowingly and voluntarily, respondents argued that the union should have been precluded from waiving them. They saw this conclusion as consistent with the "wider statutory scheme" (which includes the ADEA) that is aimed at protecting "important *public* rights."[260] However, petitioners pointed to the Court's holding in *Gilmer*, which required an "inherent conflict" to

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[252] Pyett v. Penn. Bldg. Co., 498 F.3d 88 (2d Cir. 2007).

[253] *14 Penn Plaza*, 129 S. Ct. at 1463.

[254] Brief for Respondents, *14 Penn Plaza*, *supra* note 238, at 21.

[255] *Id.* at 22–23 (quoting Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728 (1981)).

[256] Brief for Petitioners at 24, 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009) (No. 07-581).

[257] *Id.* at 22.

[258] Brief for Respondents, *14 Penn Plaza*, *supra* note 238, at 3.

[259] *Id.* at 31.

[260] *Id.* at 34 (citing McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 357 (1995)) (italics in original).

exist between a statute and the use of an arbitral forum in order to deem a waiver invalid.[261] Since *Gilmer* found that no such conflict existed under the ADEA, Petitioners argued that the Court had already settled this issue. The Court had already concluded that "there is simply no legislative direction [in the ADEA] instructing courts to carve out from FAA enforcement collectively bargained arbitral promises."[262]

Perhaps the most important issue between the parties was the dispute over Supreme Court precedent. This dispute centered on defining the scope of the Court's holding in *Alexander v. Gardner-Denver*.[263]

Respondents argued that *Gardner-Denver* was controlling here, because it held "that arbitration under a collective bargaining agreement could not preclude an individual employee's right to bring a lawsuit in court to vindicate a statutory discrimination claim."[264] They saw this as distinguishable from the holding in *Gilmer*, where "a sophisticated person in an individual employment contract" voluntarily consented to the waiver of statutory rights.[265] Petitioners viewed the *Gardner-Denver* holding more narrowly and claimed it was not controlling here. They argued that it decided only "whether an employee's submission of his contractual claim to arbitration precluded him from bringing a later lawsuit to vindicate his statutory rights under Title VII."[266] Also, the agreement at issue in *Gardner-Denver* did not grant the arbitrator authority to "invoke public laws" or "base decisions on statutory law."[267] Petitioners distinguished this from the present case, where respondents were asking the Court to "refuse to enforce collectively bargained clear agreements to arbitrate," in which the arbitrator was directed to "apply appropriate law in rendering decisions based upon claims of discrimination."[268]

Petitioners also claimed that *Gardner-Denver*'s policy arguments against arbitration were "specifically considered and rejected" by the Court in *Gilmer*.[269] In particular, they addressed the issue of union control of arbitration and the potential conflict of interest unions face in advocating for individual employee rights. Petitioners argued that this issue should not be an obstacle to enforcing arbitration here, "in part because multiple structural protections safeguard individual claims from collective harm."[270] They pointed out a union's duty of fair representation, employees' right to seek relief with the EEOC and NLRB, and the fact that unions are also subject to antidiscrimination statutes.[271] Respondents acknowledged that these

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[261] Brief for Petitioners, *14 Penn Plaza*, *supra* note 256, at 19 (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991)).

[262] *Id.* at 31.

[263] Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

[264] Brief for Respondents, *14 Penn Plaza*, *supra* note 238, at 15.

[265] *Id.* at 16.

[266] Brief for Petitioners, *14 Penn Plaza*, *supra* note 256, at 33 (citing *Gardner-Denver*, 415 U.S. at 47).

[267] *Id.* at 36 (citing *Gardner-Denver*, 415 U.S. at 53).

[268] *Id.* at 33, 36.

[269] *Id.* at 39.

[270] *Id.* at 42.

[271] *Id.* at 41–43.

safeguards existed but argued that they are insufficient and incomplete remedies for employees fighting workplace discrimination.[272] They cited *Gardner-Denver* for the proposition that antidiscrimination statutes protect "an individual's right to equal employment opportunities," and "not majoritarian processes."[273]

The parties also differed over whether the FAA encompasses arbitration of statutory claims. Petitioners claimed "[i]t has long been settled law" that agreements to arbitrate such claims are enforceable under the FAA and argued that the Supreme Court "has rejected the notion that enforcing [them] . . . would somehow weaken the protections of substantive law."[274] Respondents agreed with this position in part but included an important qualification that applies when collective bargaining agreements are involved. They cited *Gilmer* for the proposition that "waiver is enforceable under [FAA] case law only if the employee '*effectively* may vindicate [his or her] statutory cause of action in the arbitral forum.'"[275] Under this view, arbitration would not "provide an alternative viable forum" if a union were free to choose not to arbitrate employee claims.[276]

These different interpretations of the FAA carried over into different views on arbitration in general. Petitioners saw the FAA as "embod[ying] a national policy favoring arbitration, especially in the employment context."[277] They identified distinct advantages provided by arbitration, among which were efficient proceedings and lower costs for employees.[278] This position framed arbitration as "consistent with the dispute resolution goals underlying the national labor laws."[279]

Respondents, however, viewed arbitration in a different light and distinguished commercial arbitration from labor arbitration. In their view, labor arbitration is "part of a private system of workplace self-governance, not a substitute forum to litigate statutory claims."[280] Pointing to the purpose of labor arbitration—furthering industrial peace rather than protecting individual rights—respondents argued that this unique dispute resolution mechanism "is ill-suited to resolve individual employees' antidiscrimination claims."[281] They saw the role of labor arbitrators as limited to "resolving issues concerning the [collective bargaining] agreement . . . [and] apply[ing] the 'law of the shop.'"[282]

(ii.) Decision and Holding

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[272] Brief for Respondents, *14 Penn Plaza*, *supra* note 238, at 38–41.
[273] *Id.* at 12 (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974)).
[274] Brief for Petitioners, *14 Penn Plaza*, *supra* note 256, at 17.
[275] Brief for Respondents, *14 Penn Plaza*, *supra* note 238, at 42 (italics in original).
[276] *Id.* at 43.
[277] Brief for Petitioners, *14 Penn Plaza*, *supra* note 256, at 12 (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001)).
[278] *Id.* at 27–29.
[279] *Id.* at 30.
[280] Brief for Respondents, *14 Penn Plaza*, *supra* note 238, at 24.
[281] *Id.* at 25.
[282] *Id.*

Holding for 14 Penn Plaza, the Court held that "a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of law."[283]

The Court began by rejecting respondents' argument that the arbitration provision exceeded the permissible scope of the collective bargaining agreement. "Nothing in the law suggests a distinction between . . . arbitration agreements signed by an individual employee and those agreed to by a union representative."[284] It found that the union properly exercised its "broad authority" under the NLRA by bargaining in good faith with RAB.[285] Thus, the arbitration provision was viewed as a "freely negotiated term," which "easily qualifies as a 'conditio[n] of employment' that is subject to mandatory bargaining under [29 U.S.C.] § 159(a)."[286] Rejecting respondents' claim that the right to arbitration is unwaivable, the Court concluded that the union's selection of arbitration to resolve statutory discrimination claims was "no different from the many other decisions made by parties in designing grievance machinery" under collective bargaining agreements.[287]

Furthermore, the Court found that the agreement's arbitration provision was not in conflict with the ADEA nor its "remedial and deterrent function."[288] "[T]he agreement to arbitrate ADEA claims is not the waiver of a 'substantive right' as that term is employed in the ADEA."[289] *Gilmer* "squarely held" that the text and legislative history of the ADEA revealed "no evidence" that Congress "intended to preclude arbitration of claims under that Act."[290] Therefore, since Congress chose to allow for arbitration of these claims, "[t]he Judiciary must respect that choice."[291]

Central to the Court's holding was its interpretation of precedent. It agreed with petitioners' view that "[t]he holding of *Gardner-Denver* is not as broad as Respondents suggest."[292] *Gardner-Denver* was distinguishable because it dealt with an agreement that neither expressly addressed individual statutory rights nor subjected statutory antidiscrimination claims to mandatory arbitration. The Court also addressed decisions following *Gardner-Denver* and found that they had "not broadened its holding to make it applicable to the facts of this case."[293] This result was supported by the reasoning in *Gilmer*, which "made clear that the *Gardner-*

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[283] 14 Penn Plaza v. Pyett, 129 S. Ct. 1456, 1474 (2009).

[284] *Id.* at 1465.

[285] *Id.* at 1463 (quoting Communic'n Workers of Am. v. Beck, 487 U.S. 735, 739 (1988)).

[286] *Id.* at 1464.

[287] *Id.*

[288] *Id.* at 1465 (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991)).

[289] *Id.*

[290] *Id.* (quoting *Gilmer*, 500 U.S. at 35).

[291] *Id.* at 1466.

[292] *Id.*

[293] *Id.* at 1467–68 (discussing Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728 (1981), and McDonald v. W. Branch, 466 U.S. 284 (1984)).

Denver line of cases . . . do not control the outcome where. . . [the] arbitration provision expressly covers both statutory and contractual discrimination claims."[294] Therefore, the Court found nothing in *Gardner-Denver*—nor its progeny—that prohibited enforcement of the arbitration provision in the present case.

The Court also undercut respondents' reliance on *Gardner-Denver*'s policy arguments against arbitration. It acknowledged "the *Gardner-Denver* line of cases included broad dicta that was highly critical of the use of arbitration for the vindication of statutory antidiscrimination rights."[295] However, this was deemed a "distorted understanding" of the collective bargaining process, and a "misconceived view of arbitration that this Court has since abandoned."[296] These misconceptions have been corrected and replaced with a view that arbitrators are capable of resolving statutory antidiscrimination claims. Referring to the "radical change . . . in the Court's receptivity to arbitration," the Court warned that reliance on decisions hostile to arbitration "would be ill advised."[297]

Dispelling respondents' concerns about union control over the arbitration process, the Court found that Congress has provided adequate remedies for employees pursuing antidiscrimination claims. The safeguards referred to by petitioners (a union's duty of fair representation, opportunities provided by EEOC and NLRB, and a union's own statutory liability) were deemed sufficient to remedy "the situation where a labor union is less than vigorous in defense of its members' claims of discrimination under the ADEA."[298] Commenting broadly upon "the benefits of organized labor," the Court stated that Respondents' argument about union conflicts of interest "amount[ed] to a collateral attack on the NLRA."[299] The Court concluded that such arguments would be unsustainable "[u]ntil Congress amends the ADEA."[300]

Since the union did not exceed its authority in bargaining for the arbitration provision, and since the Court found *Gardner-Denver* distinguishable, the agreement was deemed enforceable under the FAA. The Court reaffirmed "that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law."[301] It cited *Circuit City* for the proposition that "[p]arties generally favor arbitration precisely because of the economics of dispute resolution."[302]

However, the Court refrained from addressing whether the FAA would compel arbitration of an agreement that actually prevented employees from "'effectively vindicating'

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[294] *Id.* at 1468.
[295] *Id.* at 1469.
[296] *Id.* at 1469–70.
[297] *Id.* at 1470 (quoting Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 77 (1998)).
[298] *Id.* at 1473.
[299] *Id.* at 1472–73.
[300] *Id.* at 1460.
[301] *Id.* at 1469 (quoting Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001)).
[302] *Id.* at 1464.

their 'federal statutory rights in the arbitral forum.'"[303] It was hesitant to invalidate the agreement in the present case "on the basis of speculation," so it left this issue for another day.[304]

Another unaddressed issue was what a "clear and unmistakable" waiver, as required by *Wright*, would look like in the context of a collective bargaining agreement. Because respondents did not argue that the wavier in this case was unclear or unmistakable, the Court assumed that it was.

(iii.) Dissenting Opinions

Justice Souter dissented, joined by Justices Stevens, Ginsburg, and Breyer. The dissent maintained that *Gardner-Denver*, along with the principle of *stare decisis*, called for refusing to enforce the contract's pre-dispute arbitration clause as applied to the respondents' ADEA claim.[305] The dissent noted that all but one of the courts of appeals had reached the same result.

The dissenters took the position that *Gardner-Denver* had concluded that unions could not waive an individual employee's access to a judicial forum to resolve a statutory discrimination claim. Additionally, the dissenting opinion noted that *Gardner-Denver* rejected the argument that participating in the arbitration amounted to a waiver of the right of access to a judicial forum for a Title VII claim as well as the suggestion that federal courts are required to defer to arbitration rulings in such cases.

The dissent added that the duty of fair representation would not provide adequate protection for individuals since a decision made reasonably and in good faith would not violate the duty even if the individual claim were meritorious.

In addition to joining Justice Souter's dissent, Justice Stevens dissented separately.

C. ANALYSIS

The *14 Penn Plaza* decision significantly expands and limits important labor law precedent. How it will be viewed in the future will depend in large part on how its principles are applied in future cases.

The decision takes an expansive view of what constitutes a mandatory subject of bargaining under the NLRA.[306] The Court accepts what is far from clear under the words of the statute or existing precedent—that the forum for resolution of individual employee statutory claims against the employer is a mandatory subject of bargaining. Although there is no doubt that this question is a "subject of interest" between the employer and the employees, it is unclear that this is a subject amenable to resolution through collective bargaining, and there is certainly

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[303] *Id.* at 1474 (quoting Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000)).
[304] *Id.*
[305] *Id.* at 1476–77.
[306] It could be argued that this position of the Court is merely dicta since it could have found that the subject is merely permissive.

no significant history of resolving this issue through collective bargaining.[307] Being designated a mandatory subject of bargaining has a number of implications under labor law, and it is far from clear that the Court has thought through all of these implications. Can an employer really bargain with the union to impasse over this subject and then unilaterally change the terms of employment to require the arbitration of individual statutory claims? Would that be a clear and unmistakable waiver under *Wright*? This would seem particularly problematic, since by unilaterally invoking arbitration, the employer would choose not only the forum but the employee's representative in any disputes—the union as exclusive representative. At the very least it would have seemed more prudent for the Court to find such terms a permissive subject rather than a mandatory subject.

If done in an even-handed fashion, broadening the definition of what constitutes a mandatory subject of bargaining could provide some opportunities for unions. The employer is the representative of the shareholders. Can the union bargain to impasse and/or strike to require that the employer limit shareholder rights and interests that impact the employees, union, or company? Can the union insist that *managers* accept arbitration as the forum for any future disputes they have with the employees, union, or company, including specifying the system of arbitration and remedies?

The decision also significantly limited *Gardner-Denver* as a precedent. Although it is certainly true that *Gardner-Denver* is distinguishable on its facts, the Court's opinion follows *Gilmer* on the relative merits of arbitration and breaks down *Gardner-Denver*'s system of allowing arbitration of contractual rights followed by the possible litigation of statutory rights. In the short run, *14 Penn Plaza* will have little impact in this regard, since few collective bargaining agreements contain clauses expressly requiring the arbitration of individual legal claims. However, it seems likely that employers will seek such clauses to limit employees to "one bite at the apple" and to limit litigation expenses. Whether unions will be willing to undertake the responsibility of litigating individual statutory claims is yet to be seen. It does not seem that arbitrators are anxious to undertake such responsibilities. The National Academy of Arbitrators filed an amicus brief in *14 Penn Plaza*, arguing against committing statutory discrimination claims "solely and exclusively" to the grievance and arbitration process.

The decision also leaves several important legal questions unanswered. For instance, the Court did not expressly address the situation where a union blocks an employee from pursuing arbitration by declining to arbitrate a discrimination claim. Under *Kravar v. Triangle Services, Inc.*,[308] a union's decision to decline to pursue arbitration cannot be a bar to the employee's pursuit of individual claims under federal law. The Court also did not address the situation where an employee's original grievance alleges joint employer and union discrimination. Individual employee claimants could argue that the *14 Penn Plaza* holding does not extend to those situations. Because of this possibility, it is difficult to predict how employers and unions will respond to this decision.

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[307] *See* First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 673 n.10 (1981) (discussing section 8(a)'s scope of mandatory subjects of bargaining).

[308] Kravar v. Triangle Servs., Inc., No. 1:06-cv-07858-RJH, 2009 WL 1392595, at *3 (S.D.N.Y. May 19, 2009).

There is pending legislation that could legislatively limit or overrule *14 Penn Plaza*. The Federal Arbitration Fairness Act of 2009,[309] which would invalidate pre-dispute mandatory arbitration agreements with respect to employment claims, would seem the most logical vehicle, but it currently invalidates only individual agreements to arbitrate and expressly exempts collective bargaining agreements. Accordingly it would have to be amended to also invalidate collective bargaining agreements to arbitrate individual statutory claims. The Employee Free Choice Act[310] would be another possible vehicle, or Congress might pass a special bill just to overturn *14 Penn Plaza*, along the lines of the Lilly Ledbetter Fair Pay Act of 2009.[311] Given the current political make-up of Congress, it seems likely that "remedial" legislation will be introduced, but it would be perilous to predict that it would actually pass.

B. ADEA

1. *Gross v. FBL Financial Services, Inc.*[312]

A. CASE BACKGROUND

(i.) Issue and Context

The issue before the Court was whether a plaintiff in a non-Title VII discrimination case must present direct evidence of discrimination in order to obtain a mixed-motive jury instruction. However, the Court addressed a different question: whether the burden of persuasion ever shifts in mixed-motive cases under the ADEA.

Gross addressed an age discrimination claim brought under the ADEA. However, petitioners and the lower courts relied on Title VII precedent in attempting to resolve the claim. The Supreme Court had previously applied Title VII interpretations to ADEA cases,[313] but the precedent was unclear in its application to petitioner's claim.

In *Price Waterhouse v. Hopkins*,[314] the Court addressed the burden of persuasion in Title VII mixed-motive cases. *Price Waterhouse* established that where plaintiffs show through direct evidence that "discrimination was a 'motivating' or a 'substantial' factor in the employer's action, the burden of persuasion should shift to the employer to show that it would have taken the same action regardless of that impermissible consideration."[315]

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[309] H.R. 1020, 11th Cong. (2009).

[310] H.R. 1409, 111th Cong. (2009).

[311] Pub. L. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 and 42 U.S.C.).

[312] Gross v. FBL Fin. Servs. Inc., 129 S. Ct. 2343 (2009).

[313] *See, e.g.*, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (1999) (declining to definitively decide whether the *McDonnell Douglas* Title VII test applies in the ADEA context).

[314] Price Waterhouse v. Hopkins, 490 U.S. 228 (1988).

[315] *Gross*, 129 S. Ct. at 2347 (discussing *Price Waterhouse*'s burden-shifting framework).

In *Hazen Paper Company v. Biggins*,[316] the Court held that a disparate treatment claim under the ADEA is not cognizable unless "the employee's protected trait actually played a role in [the employer's decision] . . . and had a determinative influence in the outcome."[317] The *Hazen* Court relied on the text of the ADEA, which stated that an employer's actions must be "because of" an employee's age. The Court did not address, however, whether the ADEA allowed for a shift in the burden of persuasion to the employer or whether the ADEA demanded that the plaintiff present direct evidence.

(ii.) Facts

After working over thirty years at FBL Financial Services, Petitioner Gross had earned the job of claims administration director. Two years later, FBL changed his job description and assigned many of his responsibilities to a younger employee. Gross considered this reassignment a demotion and filed suit in district court. He claimed that FBL violated the ADEA and introduced evidence that his demotion was, at least in part, due to his age.[318]

(iii.) Lower Courts

The district court gave the jury the following instructions: (1) it should find for Gross if he proved age was a motivating factor in FBL's decision; (2) it should find for FBL if it proved that it would have demoted Gross regardless of his age. The jury found in favor of Gross. The Eighth Circuit reversed and remanded for a new trial, holding that the trial court erred by giving the jury the improper mixed-motive instruction.[319] Relying on *Price Waterhouse*, the court of appeals determined that the district court should not have given the jury a mixed-motive instruction. Because Gross failed to present direct evidence that age was a motivating factor, the court of appeals held that the burden should not have shifted to FBL to prove that it would have made the same decision regardless of age.

B. SUPREME COURT

(i.) Decision and Holding

The Supreme Court vacated the Eighth Circuit's decision and held that the burden of persuasion never shifts in ADEA mixed-motive cases.[320] Instead, the Court articulated that it is the burden of the plaintiff to establish that age was the "but for" cause of the employer's actions.

The Court stated that Title VII cases do not control its analysis of discrimination cases brought under the ADEA. This conclusion was based on the fact that the ADEA, unlike Title VII, does not contain an express statutory provision that allows a plaintiff to establish

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[316] 507 U.S. 604 (1992).
[317] *Id.* at 610.
[318] *Gross*, 129 S. Ct. at 2347.
[319] Gross v. FBL Fin. Servs., Inc., 526 F.3d 356 (8th Cir. 2008).
[320] *Gross*, 129 S. Ct. 2343.

discrimination by proving that discrimination was a motivating factor. The Court also relied upon legislative history. When Congress amended both statutes in 1991, it added the relevant provisions to Title VII but declined to add the same to the ADEA.[321] Therefore, the Court refused to use Title VII cases—like *Price Waterhouse*—in its analysis of an ADEA case.

The Court also grounded its decision in a textual analysis of the ADEA. The ADEA states that "[i]t shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[322] Applying the ordinary meaning of "because of," the Court interpreted the ADEA to mean that age must be *the* reason that the employer acted.

This led the Court to conclude that "a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision" in order to establish a disparate treatment claim under the ADEA.[323] In other words, the burden of persuasion remains with the plaintiff to prove by a preponderance of the evidence (circumstantial or direct) that the employer would not have taken the adverse action "but for" the employee's age. The burden of persuasion never shifts to the employer. Under this analysis, age must have been the determining factor in the employer's actions in order for a plaintiff to prove a violation under the ADEA.

(ii.) Dissents

Justice Stevens argued in dissent that the Court should never ask whether a mixed-motive jury instruction is appropriate in ADEA cases. He relied upon the Court's interpretation of Title VII's language in *Price Waterhouse*—and Congress' subsequent endorsement of that interpretation—which determined that "because of" means that Title VII prohibits adverse actions motivated in whole or in part by discrimination.[324] According to Stevens, overturning the *Price Waterhouse* rule was so far-reaching an argument that it should not have been heard unless it were raised in the respondent's opposition to a writ of certiorari.[325] He also relied upon the Court's holding in *Desert Palace, Inc. v. Costa* to argue that courts resolving mixed-motive cases under the ADEA should allow either circumstantial or direct evidence, rather than requiring direct evidence. [326]

Justice Breyer's dissent argued that the Court's "but for" standard was inappropriate in an ADEA analysis.[327] While this standard is acceptable in tort cases, it presents an obstacle too difficult for employees to overcome in ADEA cases. Justice Breyer pointed out that employees may be able to show that discrimination played a role in the employer's decision, but employers

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[321] *Id.* at 2349.
[322] 29 U.S.C. § 623(a)(1) (2006).
[323] *Gross*, 129 S. Ct. at 2350.
[324] *Id.* at 2353 (Stevens, J., dissenting).
[325] *Id.*
[326] *Id.* (*citing Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003)).
[327] *Id.* at 2358–59 (Breyer, J., dissenting).

are more likely to be in a position to know the employer's mental state at the time of the adverse action.

C. ANALYSIS

In the wake of *Gross*, employers are in a better position to convince trial courts to dismiss ADEA claims. The Court has significantly raised the bar for proving age discrimination in the workplace by precluding ADEA plaintiffs from obtaining burden-shifting jury instructions from trial courts. Instead, plaintiffs retain the burden of proving that an employer's adverse action actually occurred "because of" the plaintiff's age.

This seems like a fairly activist reading for the conservative wing of the Court. It rejected a reading of similar statutory language in Title VII that was previously made by a majority of the Court and affirmed by Congress. The dissent called this "unnecessary lawmaking."[328]

The Court's decision has a broad sweep for age and disability discrimination cases but—given Congress's amendments to Title VII following *Price Waterhouse*—it will probably have little impact on Title VII cases. There is also a significant possibility that Congress will act to legislatively overrule *Gross* by constructing a consistent procedure for handling mixed motive cases across Title VII, the ADEA, and the ADA. Indeed, Senators Harkin and Leahy have introduced a bill along these lines in the Senate and Representative Miller intends to do so in the House.[329]

C Title VII

1. *Ricci v. DeStefano*[330]

A. CASE BACKGROUND

(i.) Issue

In *Ricci*, the Court addressed whether, and under what conditions, employers may engage in intentional, race-conscious discrimination for purposes of avoiding or remedying a disparate impact.

(ii.) Facts of the Case

In 2003, the City of New Haven, Connecticut, contracted with Industrial/Organizational Solutions, Inc. (IOS) to develop tests for promotions within its fire department. The Department sought to fill both captain and lieutenant positions. The City and IOS developed the tests with the aim of finding the most qualified applicants. They also developed the tests in light of the

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[328] *Id.* at 2353 (Stevens, J., dissenting).
[329] Protecting Older Workers Against Discrimination Act, H.R. 3721, 11th Cong. (2009).
[330] 129 S. Ct. 2658 (2009).

city's obligations under federal and state law, the New Haven City Charter, and a collective bargaining agreement.

The results of the tests showed a significant racial disparity. The pass rate of black applicants was approximately half the rate for white applicants. The City Charter required the city to comply with the "rule of three." The "rule of three" required that city officials fill each job vacancy from among only the top three scorers on the validated, job-related tests. If the city certified the test results and complied with the "rule of three" requirement, no African-Americans would have been eligible for any of the available lieutenant or captain positions. Before the City selected anyone for promotion, an independent Civil Service Board (CSB) needed to certify the results of the exam.

Given the racial disparity in the scores, the CSB held a number of public hearings aimed at determining whether the tests were racially biased. Some of the more influential speakers at the hearings included the city's counsel, the director of the city's Department of Human Resources, an IOS employee who led the team responsible for developing the city's tests, a representative from an IOS competitor, and a number of firefighters. Notably, the city's counsel testified that, if the CSB decided to certify the test results, the city could be liable under Title VII's disparate-impact prohibition. After the hearings, the CSB split evenly on whether to certify, and thus the results were not certified.

(iii.) Lower Courts

Petitioners, a group of firefighters who scored highly on the tests, sued after the CSB decided not to certify the examination results. They alleged that respondents violated, and conspired to violate, the Equal Protection Clause. They also filed discrimination charges with the EEOC, which issued right-to-sue letters. Before trial, petitioners amended their complaint to include an allegation that the city violated Title VII's disparate-treatment prohibition. Respondents' defense was that "they had a good faith belief that they would have violated the disparate-impact prohibition in Title VII . . . had they certified the examination results."[331]

In the district court, the parties filed cross-motions for summary judgment and the court granted respondents' motion. On the Constitutional question, the court held that respondents had not violated the Equal Protection Clause, because their actions were not "based on race."[332] On the statutory question, the court held that employers need not "certify a test where they cannot pinpoint its deficiency explaining its disparate impact . . . simply because they have not yet formulated a better selection method."[333]

In a one-paragraph opinion adopting the reasoning of the district court, a three-judge panel of the Second Circuit affirmed.[334] The court first decided the case in an unpublished

[331] *Id.* at 2671 (citation omitted).
[332] *Id.* at 2672 (citing Ricci v. DeStefano, 554 F. Supp. 2d 142, 161 (D. Conn. 2006)).
[333] *Id.* at 2671 (citing *Ricci*, 554 F. Supp. 2d at 156).
[334] *Id.* at 2672 (*citing* Ricci v. DeStefano, 530 F.3d 87 (2d Cir. 2008)).

summary order, and then later replaced that with a "nearly identical" *per curiam* opinion.[335] As discussed in the introduction to this Article, this Second Circuit panel included then-Circuit Judge Sonia Sotomayor. The Second Circuit thereafter "voted 7 to 6 to deny rehearing en banc, over written dissents" by two judges.[336]

B. SUPREME COURT

(i.) Holdings of the Court

The Court deemed it necessary to return to "the important purpose of Title VII—that the workplace be an environment free of discrimination, where race is not a barrier to opportunity."[337] The Court started from the premise that respondents' decision to discard the test results violated Title VII's disparate-treatment prohibition "absent some valid defense."[338] In other words, the court assumed discriminatory conduct and only addressed the issue of whether the city's decision relied on "a lawful justification for . . . race-based action."[339]

Petitioners argued that "under Title VII, avoiding unintentional discrimination cannot justify intentional discrimination."[340] They alternatively suggested that the only way an employer could rely upon good-faith compliance as a defense against disparate treatment was if the employer were "in fact . . . in violation of the disparate-impact provision."[341]

The Court found petitioners' arguments "overly simplistic and too restrictive of Title VII's purpose."[342] First, petitioners "ignore[d] the fact that . . . Congress has expressly prohibited both types of discrimination."[343] Second, it is well established "that 'voluntary compliance' [is] 'the preferred means of achieving the objectives of Title VII.'"[344]

Respondents "assert[ed] that an employer's good-faith belief that its actions are necessary to comply with Title VII's disparate-impact provision should be enough to justify race-conscious conduct."[345] The Court found that this argument contradicts the purpose of Title VII. It saw such an approach as "encourag[ing] race-based action at the slightest hint of disparate impact," and "amount[ing] to a *de facto* quota system in which a 'focus on statistics . . . could put undue pressure on employers to adopt inappropriate prophylactic measures.'"[346] This result would be contrary to Title VII, which "is express in disclaiming any interpretation of its requirements as

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[335] *Id.*
[336] *Id.*
[337] *Id.* at 2674.
[338] *Id.* at 2673.
[339] *Id.* at 2674.
[340] *Id.*
[341] *Id.*
[342] *Id.*
[343] *Id.*
[344] *Id.* (quoting Firefighters v. Cleveland, 478 U.S. 501, 515 (1986)).
[345] *Id.* at 2674–75.
[346] *Id.* at 2675 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 992 (1988)).

calling for outright racial balancing."[347] The Court also found that respondents' argument contradicts the language of the statute. "[W]hen Congress codified the disparate-impact provision in 1991, it made no exception to disparate-treatment liability for actions taken in a good-faith effort to comply with the new, disparate-impact provision in subsection (k)."[348]

(ii.) Decision and Holding

The Court decided the case solely on the basis that the city violated Title VII. It did not reach the constitutional issue. It reversed the Second Circuit and remanded the case with instructions that "summary judgment [was] appropriate for petitioners on their disparate-treatment claim."[349]

In *Ricci*, the Court attempted to resolve the "competing expectations" faced by employers under Title VII's disparate treatment and disparate impact prohibitions.[350] The disparate-treatment provision prohibits employers from "fail[ing] or refus[ing] to hire or to discharge any individual, or otherwise . . . discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[351] The disparate-impact provision prohibits employers from engaging in "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin."[352]

Recognizing that "these two prohibitions could be in conflict absent a rule to reconcile them," the Court sought "to provide guidance to employers and courts" about how to avoid or impose liability.[353] Specifically, it addressed whether an employer may be excused from disparate-treatment discrimination if its purpose is to avoid liability for disparate-impact discrimination. The Court's guidance came in the form of a new rule—the "strong basis in evidence" standard—imported from constitutional jurisprudence. It held "that, under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action."[354]

(iii.) The Role of Pretext and Justice Alito's "Subjective Question"

Justice Alito wrote a concurring opinion, joined by Justices Scalia and Thomas. Justice Alito noted that the majority's analysis was confined to the "objective question" of "whether the

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[347] *Id.* at 2675.
[348] *Id.*
[349] *Id.* at 2681.
[350] *Id.*
[351] 42 U.S.C. § 2000e-2(a)(1) (2006).
[352] *Id.* § 2000e-2(k)(1)(A)(i).
[353] *Ricci,* 129 S. Ct. at 2674.
[354] *Id.* at 2677.

reason given by the employer is one that is legitimate under Title VII."[355] The Court answered this question by applying the "strong basis in evidence" standard in determining the legitimacy of the employer's actions and reasons. Justice Ginsburg wrote a dissent that argued that the proper objective standard should be "good cause."[356] Justice Alito disagreed. He pointed out that Title VII requires a second step: a "subjective question" about whether "the employer's intent . . . was just a pretext for discrimination."[357] In this case, Justice Alito found that respondents would have failed the subjective part of the inquiry, even if they passed the first. He stated that "a reasonable jury could easily find that the City's real reason for scrapping the test results was not a concern about violating the disparate-impact provision of Title VII but a simple desire to please a politically important racial constituency."[358] Because of the Alito concurrence, this second subjective question of whether the employer's stated intent was simply a pretext for discrimination remains part of Title VII analysis.

(iv.) Justice Ginsburg's "Good Cause" Standard

Justice Ginsburg's dissenting opinion offered a standard alternative to the majority's "strong basis in evidence" test. She wrote that an employer should be able to avoid disparate-treatment liability as long as it has "good cause to believe the [selection] device would not withstand examination for business necessity."[359] As applied to this case, Justice Ginsburg concluded that the city would have met this standard, because "the record solidly establishes that the city had good cause to fear disparate-impact liability."[360] In support of this conclusion, she pointed to the "significant doubts" raised about the legitimacy of the tests, and the "better, less discriminatory selection methods" the city became aware of during the CSB hearings.[361]

Justice Ginsburg arrived at this "good cause" standard by examining the factual and legal context surrounding both this case and Title VII's disparate-impact doctrine. The discussion of factual context focused on the long history of unequal opportunity and racial discrimination in the New Haven fire department. Justice Ginsburg claimed that the majority's treatment of the facts ignored this "backdrop of entrenched inequality."[362] The discussion of legal context focused on the Court's holding in *Griggs v. Duke Power Company*,[363] "which explained the centrality of the disparate-impact concept to effective enforcement of Title VII,"[364] as well as the Civil Rights Act of 1991, in which "Congress formally codified the disparate-impact component of Title VII."[365]

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[355] *Id.* at 2683 (Alito, J., concurring).
[356] *Id.* at 2690 (Ginsburg, J., dissenting).
[357] *Id.* at 2683 (Alito, J., concurring).
[358] *Id.* at 2688.
[359] *Id.* at 2699 (Ginsburg, J., dissenting).
[360] *Id.* at 2707.
[361] *Id.* at 2695.
[362] *Id.* at 2691.
[363] 401 U.S. 424 (1971).
[364] *Ricci*, 129 S. Ct. at 2690 (Ginsburg, J., dissenting).
[365] *Id.* at 2698.

Justice Ginsburg argued that, given this context, a proper reading of Title VII must view the "disparate-treatment and disparate-impact proscriptions . . . as complementary."[366] It viewed "these twin pillars of Title VII" as "[s]tanding on equal footing" and "advanc[ing] the same objectives."[367] Based on this interpretation, the majority's position—that the two proscriptions are often in conflict with each other—"shows little attention to Congress' design or to the *Griggs* line of cases Congress recognized as pathmarking."[368]

Not surprisingly, the dissent describes the majority's "strong basis in evidence" standard as "enigmatic" and "not elaborated."[369] The majority's reliance on "inapposite" equal protection precedent was deemed "of limited utility," mainly because the Equal Protection Clause is only concerned with intentional—rather than disparate-impact—discrimination.[370] Furthermore, Justice Ginsburg argued that the majority's standard "makes voluntary compliance [with Title VII] a hazardous venture."[371]

C. ANALYSIS

Perhaps the central implication of the Court's decision is that employers should address concerns about the disparate impact of an employment test *before* the test is administered, not after the results are known. The Court still supports the use of employer-created tests and stated that testing "can be an important part of a neutral selection system that safeguards against the very racial animosities Title VII was intended to prevent."[372] However, the Court added an additional burden on employers seeking to use tests. This burden now falls primarily in properly designing employment tests and criteria. The Court did not imply that the "strong basis in evidence" standard applies to the designing of tests. However, the Court did provide guidance for employers seeking to avoid disparate-impact liability. It expressly stated that "Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race."[373]

The same requirements would seem to apply to an employer that created and administered a test, and only later decided how to use it. Under these circumstances, *Ricci* would allow an employer to tweak the way it weighted its scores and criteria, as long as these efforts were applied to future administration of the test. If the employer sought to apply any changes to tests that had already been administered, and these changes were racially motivated, then the employer would have to justify its measures by showing through a "strong basis in evidence" that the changes were necessary to avoid disparate-impact liability. This result is

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[366] *Id.* at 2699.
[367] *Id.*
[368] *Id.*
[369] *Id.* at 2700.
[370] *Id.*
[371] *Id.* at 2701.
[372] *Id.* at 2676.
[373] *Id.* at 2677.

consistent with the Court's statements about tests being administered in a way that meets legitimate employee expectations.[374]

Although the Court purports to support employment testing, it may be that one of the results of the *Ricci* decision is that there will be less testing. In navigating the Scylla of disparate treatment liability and the Charybdis of disparate impact, employers may follow Aeneas' lead and avoid these waters altogether.[375] Rather than test, the employer could rely on less objective procedures such as interviews and evaluations by supervisors to make decisions that achieve employment objectives with less risk of litigation. Such a change could place more discretion in the hands of supervisors; whether one believes this would be a positive or negative development in achieving the objectives of Title VII probably depends on what one thinks of the supervisors making such decisions. It would be ironic if employment tests adopted at least in part to provide objective criteria and some protection from discrimination for racial minorities were now abandoned because subjective criteria offered those workers better prospects.

The Court's opinion makes it clear that its standard in accommodating disparate impact and disparate treatment concerns cuts both ways. The facts of *Ricci* required the Court to address how the "strong basis in evidence" standard can guide employers that seek to avoid disparate-impact liability by engaging in practices that would otherwise violate Title VII's disparate-treatment prohibition. However, the Court noted that the standard can cut in the opposite direction as well: "In light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability."[376]

In his concurring opinion, Justice Alito went to some pain to make the point that subjective intent still plays a role in disparate treatment litigation. He noted that the majority's analysis was confined to the "objective question" of "whether the reason given by the employer is one that is legitimate under Title VII."[377] Justice Alito pointed out that there is a second, necessary step under Title VII: a "subjective question" regarding whether "the employer's intent . . . was just a pretext for discrimination."[378] In this case, Justice Alito found that respondents would have failed the subjective part of the inquiry, even if they passed the first. He stated that "a reasonable jury could easily find that the City's real reason for scrapping the test results was not a concern about violating the disparate-impact provision of Title VII but a simple desire to please a politically important racial constituency."[379] In short, pretext is still a component of

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[374] *Id.* at 2677 ("[O]nce that process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race.").

[375] *See* VIRGIL, THE AENEID 71 (Allen Mandelbaum trans., Univ. of Cal. Press 1987). The alternatives are to sacrifice a few sailors, as Ulysses did, or enjoy the favors of the Gods as Jason did. *See* HOMER, THE ODYSSEY 273–75 (Robert Fagles trans., Penguin 1996).

[376] *Id.* at 2681.

[377] *Id.* at 2683.

[378] *Id.*

[379] *Id.* at 2684.

Title VII analysis in conflicting-prohibition cases. Therefore, an employer's defense of good-faith compliance may require more than what the majority explained in its decision.

Justice Scalia used his concurring opinion to raise the specter that disparate treatment analysis under Title VII may be unconstitutional. According to Justice Scalia, the majority's "resolution of this dispute merely postpones the 'evil day' on which the Court will have to confront the question" concerning the constitutionality of the disparate-impact provision.[380] The Court concluded that it "need not reach the question whether Respondents' actions may have violated the Equal Protection Clause."[381] This left big questions about the future of Title VII's disparate impact prohibition. For instance, though the Court avoided deciding "whether a legitimate fear of disparate impact is ever sufficient to justify discriminatory treatment under the Constitution," it inferred that the strong basis in evidence standard may not "satisfy the Equal Protection Clause in a future case."[382]

The question is whether Justice Scalia will be able to find four other Justices on the current Court who agree that the disparate treatment doctrine is unconstitutional. It is worth noting that the Court imported the strong basis in evidence standard from "cases discussing constitutional principles."[383] Stating that it had "considered cases similar to this one . . . in the context of the Equal Protection Clause," the Court found those cases sufficiently analogous to provide a "helpful guidance."[384] It cited *Richmond v. J.A. Croson Company*[385] and *Wygant v. Jackson Board of Education*[386] for the principle that "government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a 'strong basis in evidence' that the remedial actions were necessary."[387] By reliance on constitutional precedent to bolster the disparate impact doctrine, the Court may be hinting at its unwillingness to hold the disparate impact provision unconstitutional.

IV. Conclusion

The Supreme Court continued its starboard tack in the 2008–2009 Term, and the labor and employment law decisions proved no exception to this trend. In sixty-nine percent of the "close cases" in which the Justices divided 5–4 along ideological lines, including all three such cases in labor and employment law, the conservative wing of the Court, made up of Chief Justice Roberts and Justices Scalia, Thomas, and Alito, prevailed. Indeed, the conservative wing of the Court voted in the majority in *all* of the labor and employment law cases this Term. Justice Kennedy continued to be the "man in the middle" with his vote deciding seventy-eight percent of the 5–4 decisions and all of the 5–4 labor and employment law decisions in the Term. Justice Kennedy voted with the conservative wing in the sixty-nine percent of the "close cases" it won

[380] *Id.* at 2681–82 (Scalia, J., concurring).
[381] *Id.* at 2664–65.
[382] *Id.* at 2676.
[383] *Id.* at 2675 (majority opinion).
[384] *Id.*
[385] 488 U.S. 469, 500 (1989).
[386] 476 U.S. 267, 277 (1986).
[387] *Ricci*, 129 S. Ct. at 2662.

this year, including all of the labor and employment law cases. Justice Kennedy voted in the majority in ninety-two percent of the Term's cases, far more than any other justice. The replacement of Justice Souter by Justice Sotomayor is not likely to change the underlying politics of the Court.

Three closely decided labor and employment law cases stand out from among the decisions of the Term. In *14 Penn Plaza LLC v. Pyett*,[388] the Court announced that it would enforce a collective bargaining agreement that clearly and unmistakably requires individual employees to arbitrate claimed violations of the ADEA. This decision used an expansive definition of what constitutes a "mandatory subject of bargaining" and limited the Court's prior precedent in *Alexander v. Gardner-Denver Co*. It is not clear that the parties will embrace this decision or that Congress will leave it undisturbed.

In *Gross v. FBL Financial Services, Inc.*,[389] the Court held that the burden of proof never shifts from plaintiff to employer in a mixed-motive discrimination case under the ADEA and, furthermore, that in order for a plaintiff to prove discrimination under the ADEA it must show that age was a "but for" factor in the employer's decision to take adverse action. This decision ignores the Court's contrary prior interpretation of Title VII and invites legislative intervention.

Finally in *Ricci v. DeStefano*,[390] the Court held that under Title VII, an employer is required to have a "strong basis in evidence" of potential disparate-impact liability before the employer can engage in intentional, race-conscious discrimination for the purpose of avoiding or remedying a disparate impact. This decision makes it clear that employers should address potential disparate treatment issues in the design of employment tests before the tests are administered, not based on differential results. The decision may have a modest impact on the use of employment tests and promote a move to more subjective methods of evaluation that are less subject to later legal scrutiny. All three of these cases followed the pattern of a 5–4 decision in which Justice Kennedy voted with the conservative wing of the Court to give them a victory. This pattern of voting was well established in the labor and employment law cases of the 2008–2009 Term with Justice Kennedy voting with the conservative wing of the Court in all cases. Any attorney who represents unions or employees should think twice about whether he or she can gain Justice Kennedy's vote before appealing any decision to the Supreme Court.

[388] 129 S. Ct. 1456 (2009).
[389] 129 S. Ct. 2343 (2009).
[390] 129 S. Ct. 2658 (2009).